Supreme Court, U.S.
FILED
AUG 15 2006
OFFICE OF THE CLERK

No. 06-238

IN THE

Supreme Court of the United States

WESTLANDS WATER DISTRICT,
Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal Third Appellate District

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

What showing must the federal government make to establish that federal environmental statutes mandate operation of a federal water project in a manner that causes injury to water users who take water pursuant to a federal contract and state water rights—injury that is otherwise prohibited by state water law?

PARTIES TO THE ACTION

The petitioner in the action, and the party seeking this Court's review, is Westlands Water District ("Westlands"), a water district formed and operating as a public agency under California law. The respondent in the action is the California State Water Resources Control Board ("the Board"), an agency of the State of California. The Board regulates water rights and water quality within California. Westlands named as real parties in interest the United States Bureau of Reclamation (the "Bureau"), a federal agency within the Department of Interior that operates the Central Valley Project, and the Department of Water Resources, an agency of the State of California that operates the State Water Project. The Bureau participated in state administrative proceedings before the Board, but did not consent to the jurisdiction of the state courts, and did not participate in the state court litigation.

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OPINION BELOW

The California Supreme Court's denial of Westlands' Petition for Review is attached in the Appendix at 232a. The California Court of Appeal (Third District) opinion is reported at 136 Cal. App. 4th 674 (Cal.Ct. App. 2006). The California Sacramento County Superior Court opinion was entered on May 5, 2003. It was not published and is reproduced in pertinent part in the Appendix at 233a-255a. The California State Water Resources Control Board's Revised Water Right Decision 1641 was entered on March 15, 2000. Relevant portions of this decision are reproduced in the Appendix at 259a-354a.

JURISDICTION

The final judgment of the California Court of Appeal (Third District) was entered on February 9, 2006. A timely petition for rehearing was denied on March 2, 2006. The California Supreme Court denied a timely filed Petition for Review on May 17, 2006. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case concerns the interplay among Section 8 of the 1902 Reclamation Act (codified at 43 U.S.C. §§ 372 and 383), federal reclamation contracts between the Bureau and water districts such as Westlands created under state law, and the application of the "no injury" rule in California Water Code section 1702. Also at issue is the effect that Central Valley Project Improvement Act ("CVPIA") sections 3406(a), (b)(2), (d)(1), and 3411(a) (Pub. L. No. 102-575, Title 34, 106 Stat. 4706, et seq.) have on concurrent water rights in federal reclamation projects.

STATEMENT OF THE CASE

A. Introduction

In *California v. United States* 438 U.S. 645 (1978), the Court held that under section 8 of the Reclamation Act of 1902, state laws regulating the control, appropriation, use or distribution of water by a federal reclamation project are preempted only if they manifestly conflict with the congressional directives regarding the project. Applying the Court's teaching on remand, the United States Court of Appeals, Ninth Circuit, rejected the federal government's broad claim of preemption made without specific proof of conflict between state law permit conditions and federal statutes. It found "nothing in California's conditions that cannot be in harmony with the letter and spirit of the 1962 statute given the failure of the United States to introduce evidence to show

the existence of facts that might dictate a contrary result." *United States v. State of Cal.; State Water Resources Control Board*, 694 F.2d 1171, 1174 (9th Cir. 1982).

This case presents the issue of whether shortage provisions typically found in federal reclamation contracts vitiate the *California v. United States* standard for preemption of state water laws that protect project water users. Here, the state court held that Westlands is a "legal user" of the water supplied by the Central Valley Project ("CVP"), and hence is protected under state water law from injury due to changes to CVP permits.[1] *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 803-804 (Cal. Ct. App. 2006). The state court found no cognizable injury, however, because it concluded that Westlands' reclamation contract, as interpreted by the Ninth Circuit in *O'Neill v. United States*, 50 F.3d 677, 684 (9th Cir. 1995), excuses the federal government from contractual liability for shortages in water deliveries caused by the Bureau's compliance with federal law. *State Water Resources Control Board Cases*, 136 Cal. App. 4th at 806.[2] The state court did not apply the *California v. United States* standard for showing preemption of state water law. If it had, it could not have reached the result it did.

In the state administrative proceedings below, the federal government submitted no evidence showing how changes in the approved purposes of use in the permits are in fact necessary to fulfill the mandates of federal law. Instead, the state court apparently looked only to the general purposes of

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[1] California Water Code § 1702 requires that a party seeking to change the permitted purpose of use in state water law permits, must show that the change "will not operate to the injury of any legal user of the water involved." Cal. Water Code § 1702.

[2] The Court of Appeal assumed that granting the applications to change the purpose of use would result in less water being supplied to Westlands.

the CVPIA, and the federal government's expression of a desire for "operational flexibility" in complying with the statutes, as adequate evidence that compliance with federal law mandated the subject permit changes. Since reclamation law requires that a district have a contract with the Bureau to be eligible for delivery of reclamation project water, and reclamation contracts typically contain similar shortage provisions, this approach potentially creates a broadly applicable exception from the rule of *California v. United States.*

This case raises important questions regarding the balance between state water law rights shared by water districts and the Bureau in federal projects and rights under federal reclamation contracts on the one hand, and the effect of federal environmental statutes on the other. *California v. United States*, 438 U.S. at 663-664 (stating that "[e]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters" and that the Reclamation Act of 1902 "clearly provided that state water law would control in the appropriation and later distribution of water"); *O'Neill v. United States*, 50 F.3d at 682 ("Federal law governs the interpretation of contracts entered into pursuant to federal law where the government is a party.")

This Court should accept review to clarify that the standard for application of state water law to federal reclamation projects, as articulated in *California v. United States*, applies to state water laws protecting the interests of federal project contractors.

B. Case History

1. State Board Decision.

The CVP appropriates water from Northern California to supply water to the more arid regions of California. It is the largest Bureau of Reclamation water project in the country. *Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457, 458 (9th Cir. 1994). The Bureau appropriates

water from Northern California rivers through permits, granted under state law, authorizing appropriation of water from a specific source, for a specific beneficial use. In Decision 1641, among other issues, the Board decided whether to grant the Bureau's request to amend existing CVP permits to add fish and wildlife restoration as an approved purpose of use. App. at 280a-290a, 348a-354a. Westlands objected to this request, arguing that under California Water Code § 1702, the Board cannot approve a change in purpose of use for a permit if doing so would "operate to the injury of a legal user of the water involved." Cal. Water Code § 1702. App. at 280a.

The Board approved the change in purpose of use, incorrectly finding that Bureau exclusively holds the water rights to the water appropriated under the permits. It further found that the "no injury" rule does not protect those water users "whose contractual entitlements are dependent on the water rights of the water right holder." App. at 289a-290a. Westlands challenged the Board's decision through a petition for writ of mandate. *Westlands Water District v. State Water Resources Control Bd., Super. Ct. Sac County*, 2003 No. 00CS00603. The trial court upheld the Board's decision. App. at 256a-258a. Westlands appealed.

2. The State Court Failed To Apply *California v. United States* And Misapplied Ninth Circuit Precedent.

The California Court of Appeal held that Westlands is a "legal user" of the water for purposes of California Water Code § 1702, rejecting the Board's contrary conclusion. *State Water Resources Control Board Cases*, 136 Cal. App. 4th at 804. The Court of Appeal found that Westlands is a "legal user" of CVP water based on its rights under its federal contract with the Bureau, and because it facilitated the beneficial use of the water necessary for the Bureau to establish state law appropriation rights in the first place. *Id.*

at 804 ("When a person obtains a permit to appropriate water for a specific beneficial purpose, and that purpose is to be accomplished by others who put the water to use under the terms of a contract with the permit holder, the persons who use the water are an integral part of the appropriator's right to take that water from its natural course in the first place. Without their beneficial use of the water, the appropriator would have no right to take the water.").

However, in the very next breath, the state court issued a ruling that ignored Westlands' role in creating the water rights of the CVP. It affirmed the Board's permit amendment, based on the Bureau's interest in maximizing "operational flexibility" in complying with the CVPIA. *Id.* at 806. The state court focused solely on Westlands' federal contract with the Bureau. *Id.* at 806, n.54. It engaged in no analysis of whether Westlands' concurrent state law water rights arising from beneficial use of the water were preempted under *California v. United States*, 438 U.S. 645 (1978).

The state court misapplied federal case law requiring that a federal environmental statute ***mandate*** a reduction in water deliveries before the Bureau is relieved of liability under the federal reclamation contract. The Bureau had made no showing that the mandates of environmental statutes would require it to operate in ways causing injury through shortages of water deliveries. In place of statutory mandate, the state court accepted as sufficient the Bureau's desire for operational flexibility.

Westlands filed a petition for rehearing, which was denied by the California Court of Appeal on March 2, 2006. On May 17, 2006, the California Supreme Court denied Westlands' petition for review.

C. The Special Significance of This Case.

The Bureau is the largest water wholesaler in the United States, providing water to more than 31 million people and supplying the irrigation needs for more than 10 million acres of farmland. The 17 states depending on water provided by Bureau projects contain some of the fastest growing populations in the United States. The CVP is a Bureau project and one of the world's largest water transport systems, bringing water from areas of Northern California where supply is plentiful, to regions where supplies are lacking. *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 99-100 (Cal. Ct. App. 1986).

All reclamation project water is provided under water rights created under state law in conjunction with federal contracts between the Bureau and local water associations (districts) in 17 western states. Petitioner Westlands Water District, a recipient of CVP water, is the largest water district in the United States, encompassing some 600,000 acres of farmland in California's agriculturally vital Fresno and Kings Counties.

The resolution of this case is necessary to define when federal law overrides the state water law applicable to federal project contractors. Under the state court's ruling, the shortage provision typically found in reclamation contracts may vitiate those protections.

ARGUMENT

This Court should issue a writ of certiorari to the state court, for four reasons: (1) Water district recipients of federal project water have state and federal law water rights created by beneficial use of water that are appurtenant to the land irrigated, exist independently of the federal contract with the Bureau and require analysis under *California v. United States* before being supplanted by federal environmental statutes; (2)

"Maximizing operational flexibility" is not an appropriate standard to determine whether a federal environmental statute supplants water rights under federal contract and state water law; (3) The state court's reading of the CVPIA is contrary to federal law; and (4) The state court's decision has no support in the record.

I. The *California v. United States* Preemption Analysis Should Apply to Determine Whether a Federal Environmental Statute Mandates Amendments to State Permits Because Water Districts Have State Water Law Rights Independent of Those Existing Under Federal Reclamation Contracts.[3]

The state court erred in focusing solely on Westlands' federal contract rights with the Bureau in evaluating whether Westlands suffered "injury" as a "legal user of the water involved" under California Water Code § 1702. A shortage provision in Westlands' contract with the Bureau relieved the Bureau from contractual liability for reduced annual deliveries to Westlands under some conditions, including situations in which the Bureau is required, by law, to make CVP water available for other purposes. *State Water Resources Control Board Cases*, 136 Cal. App. 4th at 805. The court baldly stated that the Bureau's desire to "maximize operational flexibility" under the CVPIA justified granting the permit changes. *Id.* at 806. To the court, the shortage provision relieved the Bureau from contractual liability if the Bureau's actions maximized operational flexibility under the CVPIA. *Id.* Thus, the court summarily determined that, despite any actual injury caused by receiving less water, Westlands suffered no cognizable injury under section 1702 because there was no contractual liability. *Id.* at 806 & n.54.

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[3] This argument was presented to both the California Court of Appeal and the California Supreme Court. *See* App. at 416a, 429a-430a, 433a-434a.

This finding of "no injury" ignores the concurrent rights independent of contract created by Westlands' and its constituent land owners' beneficial use of water appurtenant to the land—rights explicitly recognized by the state court earlier in its opinion. *Id.* at 804 ("California law has long recognized that the fundamental basis of a right to appropriate water is that the water must be put to beneficial use.") In analyzing the effect of the CVPIA on these concurrent rights, the court should have engaged in a preemption analysis as required by *California v. United States*, which requires deference to state law unless state law is contrary to the "clear and manifest purpose of Congress." *United States v. California*, 694 F.2d 1171, 1176 (9th Cir. 1982).

Rights to water diverted by Bureau projects are a product of concurrent state and federal rights coined "cooperative federalism" by the Court. *California v. United States*, 438 U.S. at 650. Although under 43 U.S.C. § 423e, water districts are required to have a contract with the Bureau to obtain federal project water, this contract is not the measure and limit of the water right. Section 8 of the Reclamation Act affords water rights apart from the contract. Section 8 of the Reclamation Act of 1902 requires great deference to state water law, stating:

> [N]othing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State ... relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the of the Interior . . . shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of the waters thereof.

43 U.S.C. § 383. Indeed, under federal reclamation law, notwithstanding water law of any particular state to the

contrary, "beneficial use shall be the basis, the measure, and the limit of the right" to reclamation project water, and the right to use the water is "appurtenant to the land irrigated." 43 U.S.C. § 372.[4]

The beneficial use by water districts confers state law water rights apart from the provisions of the federal reclamation contract. Under California law, putting water to beneficial use is essential to create a water right by appropriation. *Maeris v. Bicknell*, 7 Cal. 262, 263 (Cal. 1857). "An appropriator's right is limited to such quantity ... as he may put to a useful purpose upon his land within a reasonable time, by use of reasonable diligence." *Felsenthal v. Warring*, 40 Cal.App. 119, 133 (Cal. Ct. App. 1919). Moreover, under California law, a water right is real property and is appurtenant to land. *Fudikar v. East Riverside Irr. Dist.* 109 Cal. 29, 36-37 (Cal. 1935); *San Francisco v. County of Alameda,* 5 Cal.2d 243, 247 (Cal. 1936). The view that the federal reclamation contract with the Bureau is not the measure and limit of water districts' water rights under state law has been adopted by at least one other state supreme court. *Uintah Basin v. Bureau of Reclamation*, 133 P.3d 410, 419 (Utah 2006).[5]

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[4] The text of section 372 was originally enacted as a proviso to Section 8 of the Reclamation Act of 1902. Under this provision, even if a state did not follow the beneficial use rule, rights to reclamation project water in that state would be subject to the rule, and appurtenant to the land irrigated. 43 U.S.C. § 372.

[5] "The fact that two parties contract with each other to cooperatively pursue a certificated right to the use of water belonging to the people of the State of Utah does not lead to the conclusion that the water rights 'derive from contracts' or that the rights of one derive from its contract with the other. That is a simplistic surface analysis that disregards the source of the water rights. The rights of both parties derive from the state of Utah through their joint effort in following the appropriation procedure outlined by statute. Simply stated, the foundation of these water rights is an approved application to appropriate followed by actual beneficial use on the ground." *Uintah Basin*, 133 P.3d at 419.

Even in order to obtain a permit under California law to direct water from a stream, an applicant must show that it can put the water to beneficial use. Cal. Water Code § 1375 (stating that a prerequisite to obtaining a permit to appropriate water is that "the intended use must be beneficial"). The Bureau appropriates water for the CVP under these water rights permits issued by the Board. The Bureau does so not for its own use but for use by farmers for irrigation, and more recently, for municipal use. This creates a unique and symbiotic relationship between the Bureau, which builds and operates reclamation projects, and the individuals, represented by local water districts, who actually perfect the water rights by putting the water to reasonable, beneficial use within the authorized place of use. No vested right to CVP water could exist without the contribution of both sides of the relationship.

Importantly, the CVP appropriates water pursuant to state law water permits. The Board granted the water rights permits for the CVP in a series of water rights decisions.[6] These decisions, including particularly Water Rights Decision 935, issued June 2, 1959, analyze the respective federal and local interests in CVP water at length. Consistent with the case law discussed above, these decisions provide that although title to the CVP permits was issued to the Bureau, the beneficial interest in use of the water covered by the permits resides in the public agencies with whom the Bureau contracts, on behalf of their landowners and water users. Furthermore, these decisions specify that the right to use CVP water is appurtenant to the lands within the boundaries of such public agencies and is a "permanent right." These terms are express conditions of the CVP water rights permits. In summary, under California law, as under reclamation law, the

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[6] The water rights decisions are available online at http://www.waterrights.ca.gov/hearings/Decisions.htm. Pertinent decisions for CVP water rights include Decisions numbered 893, 935, 990 and 1020.

rights of the CVP depend upon and came into existence through the use of that water by irrigators within Westlands, among others, and the rights became appurtenant to the land within the place of use for which it was appropriated.

Under California law, the Bureau had to prove in its application to amend the purpose of use for ten CVP permits "that the change will not operate to the injury of any legal user of the water involved." Cal. Water Code § 1702. In this context, "injury" occurs when the change materially diminishes the quantity of water or deteriorates the quality for the intended uses. The symbiotic relationship between the local water district and the Bureau confers on the water district the status as "legal user." 136 Cal. App. 4th at 804. State law required the Bureau to show that its permit application would not operate to injure Westlands as a legal user of the water involved. And absent preemption by federal statute, California Water Code § 1702 prohibits amending the permits where doing so would allow injury to Westlands' state water rights created by beneficial use.

Thus, even if the state court correctly analyzed the effect of the shortage provision on Westlands' contract rights, it erred in failing to determine whether the mandates of federal law preempted Westlands' state law water rights arising from its beneficial use of project water. As we next explain, the state court did not apply the correct evidentiary standard to find that federal environmental law mandated amending existing water permits to change the authorized purposes of use.

II. Maximizing Operational Flexibility is Not an Appropriate Standard to Determine Whether a Federal Environmental Statute Supplants Water Rights Under Federal Contract and State Water Law.[7]

The state court misinterpreted *O'Neill* when it held that the interest of "maximiz[ing] operation flexibility" under the CVPIA overrode Westlands' rights under the federal reclamation contract and state law.

In *O'Neill*, the Ninth Circuit interpreted the shortage provision in Westlands' reclamation contract to relieve the Bureau from contractual liability for delivering less than the full contractual amount of water "where a reduction is ***mandated*** by statute." *O'Neill*, 50 F.3d at 684, 689 (stating that the shortage provision "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by ***statutory mandate***") (emphasis added). In *O'Neill*, the court simply interpreted the shortage provision, and left undecided whether the CVPIA in fact had mandated the water delivery shortages suffered by Westlands and other districts. *Id.* at 689 (stating that the plaintiffs' challenge to the Bureau's compliance with the ESA and CVPIA would be resolved in separate proceedings).

Importantly, *O'Neill* did not even mention "maximizing operational flexibility" as a basis for relieving the Bureau from contractual liability pursuant to the CVPIA. Indeed, if maximizing operational flexibility *were* the standard, federal reclamation contractual rights would be nothing but empty promises. Anything that limited the Bureau's obligations

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[7] This argument was presented to both the California Court of Appeal and the California Supreme Court. See App. at 416a, 418a, 433a-434a, 438a.

to actually deliver water would increase its operational flexibility.

The evidentiary standard to determine if federal environmental statutes mandate such a reduction parallels the standard necessary to establish federal preemption of a state condition on a federal water project. This is because: (1) a finding that the CVPIA mandates a use different from the pre-existing use necessarily impairs state water rights arising from the district's prior beneficial use of the water; and (2) the dictionary and statutory definitions of "mandate" closely track language for the standard applied in federal pre-emption of state water rights cases.

A. The Standard for Determining Whether a Federal Statute Mandates Amending State Permits (And Consequently Reducing Water Available to Westlands) Is the Same as Necessary to Establish Federal Preemption.

To establish that a federal environmental statute supplants rights under both federal contract and state water law, the Bureau should be required to meet the same standard applicable to federal preemption of state water law. That standard requires the Bureau to comply with state law unless state law is contrary to the "clear and manifest purpose of Congress." *United States v. California*, 694 F.2d at 1176.

B. Reallocating Water to a Different Beneficial Use Interferes With Pre-existing State Water Rights.

As set forth above, the beneficial use of project water by Westlands and its constituents confers state law water rights apart from the federal contract. Federal reallocation of water supplants these water rights existing under state law. For this reason, the federal standard for water-rights preemption should apply to determine whether under the reclamation

contract, the CVPIA or the ESA "mandate" amending water permits in a way that will necessarily result in less water being provided under the federal contract and, hence, injury to prior state law uses for the water.

C. The State Court Decision is Not Consistent With the Meaning of the Word "Mandate."

The state court decision conflicts with the ordinary meaning of the word "mandate." "Mandate" is defined as "an authoritative command or instruction" (see *American Heritage Dictionary* 792 (1982)) or "a command, order, or direction, written or oral, which court is authorized to give and a person is bound to obey." *Black's Law Dictionary* 867 (5th ed. 1979).

Analogous federal statutory law provides a similar definition. For example, the federal statute prohibiting unfunded federal mandates defines "federal intergovernmental mandate" as "any provision in legislation, statute, or regulation that: (i) would impose an enforceable duty upon State, local, or tribal governments . . . ." 2 U.S.C. § 658 (5). Like these definitions for the term "mandate," federal case law holds that there is no preemption by federal act "unless that was the clear and manifest purpose of Congress" *United States v. California*, 694 F.2d 1171, 1176 (9th Cir. 1982) (stating that state water rights should only be overridden "to the extent they conflict with federal statute.")

Here, the state court disregarded the ordinary meaning of the term "mandate." Like the standard for preemption of state water rights announced in *California v. United States*, preemption[8] by a federal statutory "mandate" requires an authoritative command or instruction *from Congress* that

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[8] Indeed, the *O'Neill* court's choice of the word "mandate," which does not appear in the shortage provision, is an implicit recognition that preemption analysis applies due to the concurrent state water rights.

necessarily supplants water rights under the federal contract and state law. Here the state court disregarded this requirement. Instead, it allowed the amendments so that the Bureau could "maximize operational flexibility." The CVPIA does not provide a clear congressional directive to place operational flexibility above rights already existing under state law and federal contract. Indeed, for reasons explained below, precisely the opposite is true.

III. The State Court Decision Is Contrary to Federal and State Law Because the CVPIA Does Not "Mandate" Repurposing of Water Permits.[9]

Contrary to the state court's holding, one should "not seek out conflicts between state and federal regulation where none clearly exists." *United States v. California*, 694 F.2d at 1176. The CVPIA does not "mandate" the repurposing of the Bureau's water permits. There is no clear and manifest directive from Congress that the Bureau obtain amended state water permits that would operate in contravention of its federal contract with Westlands and Westlands' state law water rights. In fact, the state court's finding of mandate is contrary to the CVPIA and federal case law, and is unsupported by evidence in the record.

A. The State Court Ruling Is Contrary to the CVPIA's Required Deference to State Law in Water Permit Matters.

The CVPIA establishes certain protections for fish and wildlife while explicitly reaffirming the deference to state water rights established in the Reclamation Act of 1902. In particular, the CVPIA adds fish and wildlife restoration to the authorized purposes of the CVP. CVPIA § 3406(a). It

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[9] This argument was presented to both the California Court of Appeal and the California Supreme Court. *See* App. at 417a-418a, 421a, 435a-437a, 438a.

includes two mandates requiring the Secretary to "dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield" for fish and wildlife restoration and to provide water to certain wildlife refuges at levels specified by the Bureau. CVPIA §§ 3406(b)(2), (d)(1).

Far from mandating that the Bureau be granted permission by the state to repurpose water uses, however, the CVPIA requires the Bureau to establish "no injury" under state law, because the CVPIA mandates that the Bureau follow state law regarding permit amendments as a condition precedent to repurposing the use of water. It requires that:

> [n]otwithstanding any other provision of this title, the Secretary shall, prior to the reallocation of water from any purpose of use . . . specified within applicable Central Valley Project water rights permits and licenses to a purpose of use or place of use not specified in said permits or licenses, obtain a modification in those permits or licenses, in a manner consistent with the provisions of applicable State law, to allow such change in purpose of use or place of use.

CVPIA § 3411(a).

The "no injury rule" of California Water Code § 1702 is one of the "provisions of applicable state law" that the Secretary of the Interior is bound to follow before reallocating CVP water pursuant to the CVPIA. Thus, the state court had it backwards in holding that the CVPIA mandated the Bureau's request for change of purpose of use. The CVPIA actually compels the Bureau to comply with the state's no injury rule ***before*** changing purposes of use. Therefore, the CVPIA prohibited the permit change from being granted if Westlands or other legal users would be injured.

The state court's conclusion that compliance with the CVPIA necessitated the permit amendments is contrary to Ninth Circuit precedent interpreting the CVPIA. Three

existing CVP permits, for two reservoirs, already allowed the Bureau to use water for fish and wildlife purposes before the Bureau applied to change the purpose of use for ten additional permits. In 1994, in *Westlands v. Natural Resources Defense Council*, 43 F.3d 457, 461 (9th Cir. 1994), the Ninth Circuit had found that these three existing permits "provide ***ample water*** to implement sections 3406(b)(2) and (d)(1)" of the CVPIA.

In that case, Westlands sought to enjoin implementation of CVPIA sections 3406(b)(2) and (d)(1) pending compliance with the National Environmental Policy Act (NEPA). Westlands argued that the Secretary had time to comply with NEPA prior to implementing these sections because CVPIA § 3411 required the Secretary of the Interior to first obtain Board approval to change the purpose of use. The Ninth Circuit rejected that argument, explaining:

> The water districts suggest that section 3411(a) will prevent the Secretary from immediately implementing sections 3406(b)(2) and (d)(1) because only three of the Bureau of Reclamation's water permits provide for fish and wildlife use. . . . The Bureau's three permits provide ample water to implement sections 3406(b)(2) and (d)(1). Consequently, Section 3411(a) will not delay the Secretary's implementation of these sections.

Westlands, 43 F.3d at 461.

Thus, the only Ninth Circuit case to squarely address this issue found that the CVPIA may be implemented ***without*** the amendments to purpose of use approved in Decision 1641. Repurposing water use of the ten other CVP permits applicable to other reservoirs was not "mandated" because the Bureau already had sufficient water under permit with the approved uses to comply with the requirements of the CVPIA. Allowing permit amendments that could allow further injury to project contractors was not a result mandated by the CVPIA.

B. There Was No Evidence That The Permit Changes Were Necessary To Allow Project Operations Compelled By The CVPIA.

The Bureau made no showing before the Board establishing that the CVPIA mandated reoperation of the projects in a way that unavoidably would reduce water supplies available to Westlands. In fact, the Bureau's attorney explicitly disavowed any intention of proving anything about project operations. App. at 397a-398a.[10]

The federal government presented two witnesses, Ms. Connie Rupp and Mr. Frank Michny, in the Board proceedings that addressed changes in purposes of use. Ms. Rupp was the sole federal government witness offered to justify the proposed changes to the purposes of use. App. at 396a-397a, 357a, 408a.

In Board proceedings, direct testimony is submitted by affidavit. Less than a page of Ms. Rupp's written testimony concerned the change in purpose of use. Ms. Rupp was the Chief of the Water Rights Section of the Division of Resources Management for the Mid-Pacific Region of Reclamation. App. at 380a. She holds a law degree, not an engineering degree. *Id.* Ms. Rupp's written testimony stated the federal government's rationale for the proposed changes in purpose of use as follows:

> With the magnitude of the CVP and its integrated operations . . . it is not practical to try to match up a particular beneficial water use to a specific permit. In addition, in 1992, Congress passed the Central Valley Project Improvement Act (CVPIA), which amended the

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[10] "I just wanted to emphasize that the witnesses today will not be talking about how the Bureau would intend to reoperate the Central Valley Project if you do, in fact, grant the modifications we are requesting. Those are subjects that are separate and apart from the phase of these proceedings that we are currently involved in." App. at 397a-398a.

> CVP authorizations to include fish and wildlife mitigation, protection and restoration purposes. Consequently, it is important that all of the CVP permits in this petition include the state-defined beneficial use of 'fish and wildlife preservation and enhancement' to maximize operational flexibility in order to comply with the CVPIA.

App. at 357a.

Ms. Rupp's written testimony did not further elaborate why it was "important" that all CVP permits include fish and wildlife uses for "operational flexibility." She did not specify how the CVP operates, or what operations are necessary to comply with the mandates of the CVPIA. She did not set forth why the proposed permit changes involving purposes of use were necessary to comply with federal law mandates.

Indeed, she was not even qualified to provide such testimony. She conceded during cross-examination that she was not involved in CVP operations, and was not an expert in such operations. App. at 399a, 400a, 401a. She conceded that her written testimony assertion that it would not be "practical" to account for water used by specific permit for each facility was offered only in a "layperson" capacity. App. at 405a. In further contradiction of her written testimony, she testified that "[w]e can probably break down our project operations facility by facility . . . ." App. at 403a.

The Bureau did not prove that the CVPIA necessitated permit changes. In its closing brief for this phase of the Board hearings, the government cited the shortage provision in the Westlands contract, listed sections of the CVPIA it contended "mandate deliveries of CVP water for fish protection and enhancement" and then asserted that "there will undoubtedly be years in which" meeting those mandates would result in shortages. App. at 410a. It argued that "it would be inappropriate and inconsistent with such Congressional directives for the Board to deny [its] request to have its

water right permits revised, to the extent necessary, to enable it to comply with those directives." *Id.* However, it did not support its arguments with evidence showing why or to what extent operations that result in shortages are compelled by Congressional directives. No witness for the Department of the Interior testified regarding what changes to CVP operations are compelled by the CVPIA. No witness for the Department testified concerning what operational options the Bureau has for complying with the CVPIA, or how the various options compare in terms of causing injury to CVP contractors. No witness provided testimony demonstrating that injury to CVP contractors from adding fish and wildlife uses to the CVP permits would be limited to that injury mandated by operation of federal law. There simply is no evidence that changes in uses of water permitted under the CVP permits were required to comply with the CVPIA, or any other mandate of federal law.

CONCLUSION

For all of the reasons discussed above, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEAL,
THIRD DISTRICT, CALIFORNIA

No. C044714

Feb. 9, 2006
Review Denied May 17, 2006

STATE WATER RESOURCES
CONTROL BOARD CASES

ROBIE, J.

The history of California is written on its waters-from the Eel River, to the Salton Sea, to the Colorado River, to Lake Tahoe. But no area has been more critical than the Sacramento and San Joaquin Rivers and their great Delta and San Francisco Bay estuary.

Before us are eight appeals and three cross-appeals in seven coordinated cases known collectively as the "SWRCB Cases," Judicial Council Coordinated Proceeding No. 4118. These cases arose out of an omnibus water rights proceeding before the State Water Resources Control Board (the Board) that ostensibly began with notices issued in July 1995, and ostensibly ended in March 2000 with Revised Water Right Decision 1641 (Decision 1641).

In truth, however, the water rights proceeding from which these appeals arose is but a small part of a process that has been ongoing for more than four decades to solve the problems of water quality in the San Francisco Bay/Sacramento-

San Joaquin Delta Estuary.[1] In the water rights proceeding, the Board sought to allocate responsibility among various water rights holders for meeting the flow-dependent water quality objectives in the Water Quality Control Plan for the Bay-Delta, which the Board had approved in May 1995 (the 1995 Bay-Delta Plan).[2] As will be *Seen*, Decision 1641 assigned much of that responsibility to the two great water projects in the state-the Central Valley Project (CVP), operated by the United States Bureau of Reclamation (the Bureau), and the State Water Project (SWP), operated by the Department of Water Resources (the Department) which, in normal water years, export about 30 percent of the water that reaches the Delta. Many of the issues on appeal involve this allocation of responsibility.

The water rights proceeding giving rise to these appeals also dealt with two other long-standing issues: first, a petition filed by the Bureau and the Department in 1995 to use each other's points of diversion in the southern Delta (the joint points of diversion petition), which had its origin in a similar petition filed by the Bureau in 1981; and second, a petition filed by the Bureau in 1985 (and thereafter amended) to change the places of use and conform the purposes of use in many of its CVP permits (the change petition).

On the joint points of diversion petition, the Board, in Decision 1641, conditionally granted the Bureau and the Department the right to use each other's pumping plants in the

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[1] We will refer to the entire area as the Bay-Delta. When it is necessary to refer only to the Sacramento-San Joaquin Delta, we will refer to the Delta. (*See* Wat.Code, § 12220 [setting forth the boundaries of the Sacramento-San Joaquin Delta].)

[2] The Board defined "flow-dependent objectives" as "all objectives that could be met by the flow of water or by changes in the operations of [diversion] facilities, notwithstanding that such objectives also could be met entirely or partially through other means, such as management measures and waste discharge requirements."

southern Delta to export water to the south and west. On the change petition, the Board took two actions. Decision 1641 approved the Bureau's request to conform the purposes of use in its CVP permits, which had the effect of adding fish and wildlife enhancement as an authorized purpose of use for water appropriated under 14 of those permits. Decision 1641 also approved the Bureau's request to change the places of use in its CVP permits, but only in part. The Board authorized the addition of lands that were previously outside the permits' authorized places of use but were already being served by CVP water, subject to mitigation requirements imposed on the Bureau for all of that land first converted to irrigated agricultural use by the delivery of that water. The Board did not, however, authorize the addition of lands that were not already being served by CVP water but were within the service districts of various CVP contractors. Instead, the Board determined those lands could be added later on a case-by-case basis.

Not surprisingly, given that water from the Delta is diverted to meet the needs of two-thirds of the population of California and to irrigate 4.5 million acres, many individuals and entities interested in Delta water appeared before the Board in the water rights proceeding at issue here. Again not surprisingly, not all of those parties were satisfied with the Board's Decision 1641, which is what brings us here today. Originally, four cases challenging different aspects of the Board's decision were coordinated and assigned to Judge Roland L. Candee. Ultimately, seven more cases were added, and three were dismissed, leaving eight.

In May 2003, Judge Candee issued his statement of decision in the coordinated cases, upholding Decision 1641 with two exceptions. First, Judge Candee concluded the Board erred when it failed to allocate responsibility for meeting all

of the flow objectives in the 1995 Bay-Delta Plan.[3] Second, he concluded the Board erred as to the change petition, when it refused to include all of the lands within the service area of Westlands Water District (Westlands) for authorized place of use in the Bureau's CVP permits without any mitigation requirement. This latter conclusion rested on Judge Candee's determination that a 1965 statute that merged Westlands with another water district[4] "effectuated a statutory authorization for the delivery of federal CVP water to all of the lands of the combined . . . district."

From the resulting judgments, eight timely notices of appeal and three timely notices of cross-appeal were filed in seven of the coordinated cases. The Board and two other groups of parties challenge Judge Candee's ruling that Decision 1641 failed to implement all of the flow objectives in the 1995 Bay-Delta Plan. The Board also challenges Judge Candee's ruling that it must expand the authorized place of use in the Bureau's CVP permits to include all of the Westlands service area without any mitigation requirement. Various other parties challenge other aspects of Judge Candee's ruling, in which he upheld the remainder of Decision 1641. These challenges raise numerous issues regarding the law of water rights, as well as issues regarding the California Environmental Quality Act (CEQA; Pub Resources Code, § 21000[5] et seq.).

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[3] As we will explain more fully later, a flow objective is a water quality objective based on the amount of water (measured in cubic feet per second) flowing in a watercourse at a given time.

[4] This statute is the Westlands Water District Merger Law (Wat Code, §§ 37800-37856), sometimes referred to as the Merger Statute or Merger Law.

[5] We will refer to the CEQA statutes in the format of CEQA, section __. All other statutory references are to the Water Code unless otherwise indicated.

Following this introduction, we will begin by setting forth the factual and procedural background of the coordinated cases, starting with brief descriptions of the CVP and SWP and continuing with a summary of the efforts to address the problems of water quality in the Delta, which led to the Board's adoption of the 1995 Bay-Delta Plan. From there, we will summarize the underlying water rights proceeding in which the Board sought to allocate responsibility for meeting the flow-dependent objectives in the 1995 Bay-Delta Plan among the various water rights holders with interests in water that flows into the Delta.[6] We will also describe the joint points of diversion petition and the change petition, the reasons behind those petitions, and the Board's actions on them. We then will turn to the trial court proceedings.

The discussion section of our opinion will first address arguments on appeal relating to the Board's implementation of the 1995 Bay-Delta Plan in the water rights proceeding. We will then address challenges relating to the joint points of diversion petition. Following this, we will address challenges to the environmental impact report (EIR) the Board prepared for the implementation of the 1995 Bay-Delta Plan and for the joint points of diversion petition. After addressing challenges relating to the change petition and to the EIR the Board prepared for that petition, we will conclude by addressing challenges to the Board's impartiality.

We agree with Judge Candee in most respects, but disagree with him in a few instances. Most significantly, we agree with Judge Candee that the Board erred when it failed to allocate responsibility for meeting all of the flow objectives in the

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[6] This opinion does not purport to provide a comprehensive summary of either the 1995 Bay-Delta Plan or the water rights proceeding underlying these coordinated cases. Instead, our summary will focus on those aspects of the 1995 Bay-Delta Plan and those aspects of the proceeding that are relevant to the arguments before us on appeal, most of which relate to the San Joaquin River.

1995 Bay-Delta Plan. As will be *Seen*, we conclude the Board was not entitled to implement alternate flow objectives agreed to by various interested parties in lieu of the flow objectives actually provided for in the 1995 Bay-Delta Plan. We also conclude that the Board failed to adequately implement certain salinity objectives in the 1995 Bay-Delta Plan and failed to implement the minimum flows necessary to achieve the narrative objective for salmon protection in the 1995 Bay-Delta Plan.

Unlike Judge Candee, however, we conclude the Merger Law did not impose a ministerial duty on the Board to augment the authorized place of use in the Bureau's CVP permits to include all of the lands within the Westlands service area without mitigation. We also reject all of the alternate arguments for upholding this aspect of Judge Candee's decision.

Based on our conclusions, we will affirm, modify, and reverse the judgments in the seven coordinated cases as appropriate.

FACTUAL AND PROCEDURAL BACKGROUND

I

The CVP And The SWP

Nearly 20 years ago, in an opinion authored by former Presiding Justice John T. Racanelli that is often identified simply as *Racanelli,* the Court of Appeal, First Appellate District, Division One, addressed an earlier attempt by the Board to adopt water quality objectives for the Delta. *(United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 227 Cal.Rptr. 161.) Rather than reinvent the wheel, we will draw on that opinion extensively, particularly in setting forth the background necessary to understand the issues in these coordinated cases.

We begin with Justice Racanelli's description of the two great California water projects-the CVP and the SWP.

A

The CVP

"The history of California water development and distribution is a story of supply and demand. California's critical water problem is not a lack of water but uneven distribution of water resources. The state is endowed with flowing rivers, countless lakes and streams and abundant winter rains and snowfall. But while over 70 percent of the stream flow lies north of Sacramento, nearly 80 percent of the demand for water supplies originates in the southern regions of the state. And because of the semiarid climate, rainfall is at a seasonal low during the summer and fall when the demand for water is greatest; conversely, rainfall and runoff from the northern snowpacks occur in late winter and early spring when user demand is lower. [Citation.] Largely to remedy such seasonal and geographic maldistribution, while simultaneously providing relief from devastating floods and droughts, the California water projects were ultimately conceived and formed.

"In 1933 the California Legislature adopted a plan for transfer of surplus water from the Sacramento River and its northern tributaries to the water-deficient areas of the San Joaquin Valley through construction of a 'Central Valley Project': Shasta Dam, the central feature, to store and regulate waters of the Sacramento River; Friant Dam, on the western edge of the Sierra, to divert water from the San Joaquin River to southern regions of the valley; and various other units designed to transfer water from the Sacramento River system to the San Joaquin Valley. (Wat.Code, § 11100 et seq.) However, due to the pervasive unfavorable economic conditions during the Great Depression, the state turned to the federal government to finance and construct the massive project.

"Construction of the CVP began in 1937. It is now one of the world's most extensive water transport systems.[7] As

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[7] Appendix A attached to this opinion depicts the major facilities of the CVP.

noted, Shasta Dam on the upper Sacramento River is the focal point of the CVP. Shasta Dam was completed in 1945 but began storing water and generating electric power in 1944. The waters of the Sacramento River which flow past the Shasta Dam are augmented by additional water supplies brought through a tunnel from the Trinity River and from reservoirs formed by Folsom and Nimbus Dams on the American River. About 30 miles south of Sacramento, the Delta Cross Channel regulates the passage of Sacramento River water through the Delta to the Tracy Pumping Plant.

"At Rock Slough, a portion of the water is pumped into the Contra Costa Canal for municipal uses in Contra Costa County. At the Tracy Pumping Plant, the water is lifted nearly 200 feet above sea level into the Delta[-]Mendota Canal and flows 117 miles southward to the Mendota Pool. Here, the waters from the north replace the natural flow of the San Joaquin River. At Friant Dam, the flow of the San Joaquin River is impounded and diverted through the Friant-Kern Canal 152 miles south to the southern reaches of the San Joaquin Valley." *(United States v. State Water Resources Con-trol Bd., supra,* 182 Cal.App.3d at pp. 98-99, 227 Cal.Rptr. 161, fn. omitted.)

In addition to providing water to replace the flow of the San Joaquin River at the Mendota Pool, the Delta-Mendota Canal also supplies water for agricultural users on the west side of the San Joaquin Valley and conveys water for storage in San Luis Reservoir. That reservoir provides water to CVP contractors in the San Joaquin Valley as well as to Santa Clara and San Benito Counties through the Pacheco Tunnel.

Another part of the CVP significant to this proceeding is New Melones Dam on the Stanislaus River, which joins the San Joaquin River near Vernalis. Completed in 1979, New Melones provides flood control and maintains water quality conditions in the Stanislaus and San Joaquin Rivers. Water from New Melones is also delivered to local CVP contractors.

The CVP supplies water to over 250 long-term water contractors under contracts with the Bureau. Most of those contractors put the water to agricultural use; as of 1999, CVP water was used to irrigate approximately 19,000 farms covering three million acres. The CVP also supplies water to many urban areas in northern and central California, including Redding, Sacramento, most of Santa Clara County, Stockton, and Fresno.

"Under section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), the . . . Bureau is required to comply with state law and to acquire water rights for diversion and storage of water by the CVP." *(United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 106, 227 Cal.Rptr. 161; *See* also *California v. United States* (1978) 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 [a state may impose any condition on control, appropriation, use or distribution of water in a federal reclamation project which is not inconsistent with clear congressional directives respecting the project].) Permit applications to appropriate water for the CVP, initially filed on behalf of the state, were assigned to the Bureau when the federal government assumed responsibility for constructing the CVP. *(United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 106, 227 Cal.Rptr. 161.) "The CVP was actually completed and in operation before permits [to appropriate water for the project] were issued: the first permits were issued to the . . . Bureau in 1958 . . . and the principal permits were issued in 1961 . . . ." *(Ibid.)*

B

The SWP

"Following World War II, state authorities renewed their efforts to develop a comprehensive statewide water plan. In 1951 the Legislature authorized the Feather River and Sacramento-San Joaquin Delta Diversion Project. (§ 11260.) This

project-referred to as the SWP-began operations in 1967 under management of the [Department].[8] Water from the Feather River is stored behind Oroville Dam and is released into the Feather River and its eventual confluence with the Sacramento River." *(United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at pp. 99-100, 227 Cal.Rptr. 161, fn. omitted.) In the northern Delta, water is diverted from Barker Slough into the North Bay Aqueduct for municipal use in Solano and Napa Counties. "The water flow continues through the Delta to the Clifton Court Forebay [in the southern Delta] where a portion of it enters the South Bay Aqueduct for delivery to [urban and agricultural areas in Alameda and Santa Clara Counties]. A much greater portion is lifted [at the Harvey O. Banks Delta Pumping Plant] into the California Aqueduct for transport through the San Joaquin Valley [and for use by contractors in the southern San Joaquin Valley] and eventually again lifted by a series of pumping stations over the Tehachapi Mountains for delivery and use in the Southern California region." *(Id.* at p. 100, 227 Cal.Rptr. 161.)

SWP water is delivered to 29 long-term contractors, including agricultural users in the San Joaquin Valley, with Kern County Water Agency having the contract for the greatest amount of water. SWP water transported to Southern California is used primarily for municipal and industrial purposes; Metropolitan Water District of Southern California is the SWP's largest contractor.

The permits to appropriate water for operation of the SWP were issued to the Department in 1967. *(United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 106, 227 Cal.Rptr. 161.)

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[8] Appendix B attached to this opinion depicts the major facilities of the SWP.

II

Water Quality In The Delta

Obviously, the Delta plays a major role in both of California's great water projects, as water exported by both projects to the San Francisco Bay Area, the San Joaquin Valley, and Southern California is diverted from the southern Delta for transportation to the west and south. Thus, the quality of water in the Delta is important to the projects and their contractors, as well as to other water users in and around the Delta, and to the maintenance and enhancement of fish and wildlife in the Delta.

Once again, we turn to Justice Racanelli's opinion:

"The Delta generally describes a large lowland area with a labyrinth of natural channels in and around the confluence of the Sacramento and San Joaquin Rivers. The combined river water passes through the Delta into Suisun Bay and then into San Francisco Bay. In 1959, the legal boundaries of the Delta were fixed by the Legislature. (§ 12220) The bounded area is roughly triangular, with Sacramento at the north, Vernalis at the south and Pittsburg at the west.

"The major factor affecting water quality in the Delta is salt water intrusion. Delta lands, situated at or below sea level, are constantly subject to ocean tidal action. Salt water entering from San Francisco Bay extends well into the Delta, and intrusion of the saline tidal waters is checked only by the natural barrier formed by fresh water flowing out from the Delta.

"But as fresh water was increasingly diverted from the Delta for agricultural, industrial and municipal development, salinity intrusion intensified, particularly during the dry summer months and in years of low precipitation and runoff into the river systems. One of the major purposes of the projects was containment of maximum salinity intrusion into

the Delta. By storing waters during periods of heavy flow and releasing water during times of low flow, the freshwater barrier could be maintained at a constant level." *(United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 107, 227 Cal.Rptr. 161.)

A

Before The 1995 Bay-Delta Plan

Efforts to address water quality problems in the Delta date back more than 40 years. In 1961, the State Water Rights Board[9] (the Water Rights Board) adopted Decision 990, which approved the Bureau's applications for permits to appropriate water from the Sacramento River and the Delta for the CVP. In that decision, the Water Rights Board recognized the problem of salinity incursion into the Delta, but the Water Rights Board did not attach any specific water quality standards as terms and conditions of the CVP permits. Instead, the Water Rights Board reserved jurisdiction to impose such requirements later, allowing the Bureau, the state, and water users in the Delta an opportunity to reach agreement on salinity control for the Delta in the interim.

In 1965, various interested parties reached agreement on water quality criteria for the Delta-the so-called Tracy standards. (*See United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 110, 227 Cal.Rptr. 161.) Two years later, the Water Rights Board issued Decision 1275, which approved the Department's applications for

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[9] The State Water Rights Board, one of the predecessors to the current State Water Resources Control Board, was created by the Legislature in 1956 as a constituent entity within the state's Resources Agency, independent from the Department, to serve as a quasi-judicial body with the responsibility for administering water rights. (*See* Stats.1957, 1st Ex.Sess. 1956, ch. 52, § 7, pp. 425-427; Assem. Interim Com. on Water, A Proposed Water Resources Control Board for California: A Staff Study (July 1966) pp. 19-21.)

permits to appropriate water from the Feather River and the Delta to operate the SWP. In that decision, the Water Rights Board noted that "both federal and state agencies are conducting extensive studies regarding the problem of water quality in the San Francisco Bay and the Delta for the purpose of determining what standards of water quality should be maintained and recommending how this is to be accomplished." Because it lacked "sufficient information . . . to finally determine the terms and conditions regarding water quality in the Delta which will reasonably protect vested rights without resulting in waste of water," the Water Rights Board reserved jurisdiction to impose terms and conditions on the SWP permits for water quality control. In the interim, the Water Rights Board limited the Department's diversion and storage of water from April 1 through June 30 in certain circumstances and conditioned the permits on compliance with the Tracy standards.

Meanwhile, in 1966, a proposal was made to consolidate the then existing State Water Quality Control Board with the Water Rights Board into a new agency—the State Water Resources Control Board. (*See* generally Assem. Interim Com. on Water, A Proposed Water Resources Control Board for California: A Staff Study, *supra.*) The purpose of this consolidation was "to provide for the orderly and efficient administration of the water resources of the state [by] establish[ing] a control board which shall exercise the adjudicatory and regulatory functions of the state in the field of water resources" and "to combine the water rights and the water pollution and water quality functions of state government to provide for consideration of water pollution and water quality, and availability of unappropriated water whenever applications for appropriation of water are granted or waste discharge requirements or water quality objectives are established." (§ 174.) Legislation creating the consolidated Board was enacted in 1967, and the Board came into existence on December 1, 1967. (Stats.1967, ch. 284.)

In 1969, the Legislature enacted a new water quality control law-the Porter-Cologne Water Quality Control Act (Porter-Cologne Act; § 13000 et seq.). (Stats.1969, ch. 482; *See* also Robie, *Water Pollution: An Affirmative Response by the California Legislature* (1970) 1 Pacific L.J. 2.) A summary of some of the provisions of that act will assist in understanding the efforts to address water quality in the Delta that followed.

"[T]he Porter-Cologne Water Quality Control Act . . . establishes a comprehensive statewide program for water quality control administered by nine regional boards and coordinated by the state Board. The regional boards are primarily responsible for formulation and adoption of water quality control plans covering the state's 16 planning basins (§ 13240) subject to the Board's review and approval (§ 13245). But the Board alone is responsible for setting statewide policy concerning water quality control (§§ 13140-13147).

"And in its capacity as the designated state water pollution control agency for purposes of the Federal Water Pollution Control Act (§ 13160), the Board is empowered to formulate its own water quality control plans which supersede conflicting regional basin plans. (§ 13170.)" (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 109, 227 Cal.Rptr. 161.)

Under the Porter-Cologne Act, "'[w]ater quality control' means the regulation of any activity or factor which may affect the quality of the waters of the state. . . ." (§ 13050, subd. (i).) "'Quality of the water' . . . refers to chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use." (*Id.*, subd. (g).) A water quality control plan "consists of a designation or establishment for the waters within a specified area of all of the following: [¶] (1) Beneficial uses to be protected. [¶] (2) Water quality objectives. [¶] (3) A program

of implementation needed for achieving water quality objectives." (*Id.*, subd. (j).) "'Water quality objectives' means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." (*Id.*, subd. (h).)

"In formulating a water quality control plan, the Board is invested with wide authority 'to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.' (§ 13000.) In fulfilling its statutory imperative, the Board is required to 'establish such water quality objectives . . . as in its judgment will ensure the reasonable protection of beneficial uses. . .' (§ 13241), a conceptual classification far-reaching in scope.[10]

"Beneficial uses" of the waters of the state that may be protected against quality degradation include, but are not necessarily limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.' (§ 13050, subd. (f).) Thus, in carrying out its water quality planning function, the Board possesses broad powers and responsibilities in setting water quality [objectives]."[11]

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[10] Although on its face section 13241 applies only to water quality objectives established by the regional boards, section 13170 provides that the Board "may adopt water quality control plans in accordance with the provisions of Sections 13240 to 13244."

[11] The opinion authored by Justice Racanelli frequently refers to "water quality standards," but the term used in the Porter-Cologne Act is "water quality objectives." (*See* § 13241.) Accordingly, in quoting Justice Racanelli's opinion, we have substituted the word "objectives" for the word "standards" where appropriate.

(*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at pp. 109-110, 227 Cal.Rptr. 161.)

The program of implementation that must be included in every water quality control plan must "include, but not be limited to: [¶] (a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private. [¶] (b) A time schedule for the actions to be taken. [¶] (c) A description of surveillance to be undertaken to determine compliance with objectives." (§ 13242.) Also, the Board may "not adopt any water quality control plan unless a public hearing is first held, after the giving of notice . . . ." (§ 13244.)

"In performing its regulatory function of ensuring water quality by establishing water quality objectives, the Board acts in a legislative capacity." (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 112, 227 Cal.Rptr. 161.) "[W]ater quality control plans . . . are quasi-legislative." (*State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 701-702, 16 Cal.Rptr.2d 25.)

In 1971, following the enactment of the Porter-Cologne Act, "the Board issued Decision 1379 establishing new water quality [objectives] purportedly applicable to both the CVP and the SWP. The decision was stayed as a result of litigation challenging the Board's authority to impose conditions on permits held by a federal agency.[12]

"At about the same time, the regional water quality control boards (see § 13240) formulated plans for the 16 'basins' of the state, including the Delta and the Suisun Marsh. The Basin 5B Plan, setting water quality [objectives] for the

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[12] We have been asked to take judicial notice of Decision 1379; that request is granted.

Delta, and the Basin 2 Plan, setting [objectives] for the San Francisco Bay Basin, were finally approved by the Board in 1975.

"In approving the Basin 5B Plan, the Board indicated its intention to convene hearings no later than July 1, 1978, for the purpose of receiving further evidence relating to salinity control and protection of fish and wildlife. [Over an 11-month period], the Board held an extended evidentiary hearing culminating in [August 1978 with the] adoption of the 1978 Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh. The Plan [wa]s intended to remain in effect for 10 years with new hearings to be scheduled in 1986 to reevaluate the Delta [objectives].

"In conducting the 1978 proceedings, the Board for the first time acted pursuant to its combined authority to determine water rights and to establish water quality [objectives]. (§ 174.) In discharging its dual functions, the Board reconsidered existing water quality [objectives] in light of current data concerning the effects on the Delta of the operations of the two water projects-the users with the greatest impact. The Board also undertook to modify the existing water rights permits of the projects-the water rights holders with the lowest seniority-in order to implement the enacted water quality [objectives].

"The final product of the Board's efforts was the Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh and Water Right Decision 1485. In the Plan, the Board set new water quality [objectives] to protect fish and wildlife and to protect agricultural, industrial and municipal uses of Delta waters. In the Decision, the Board modified the permits held by the . . . Bureau and the [Department] to compel the projects to release enough water into the Delta or to reduce their exports from the Delta so as to maintain the water quality [objectives] set in the Plan."

(*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at pp. 110-111, 227 Cal.Rptr. 161.)

A number of parties filed mandamus petitions seeking to invalidate the water quality control plan and Decision 1485. (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 111, 227 Cal.Rptr. 161.) In the coordinated proceeding on those petitions, the trial court rejected the Board's water quality objectives as inadequate and issued a writ of mandate commanding the Board to set aside the plan and the decision and to reconsider the plan. (*Id.* at pp. 111, 120, 227 Cal.Rptr. 161.)

On appeal, in the 1986 opinion authored by Justice Racanelli, the appellate court concluded "that the modification of the projects' permits in order to implement the water quality [objectives] was a proper exercise of the Board's water rights authority," but "in establishing only such water quality [objectives] as will protect Delta water users against the effects of project activities, the Board misconceived the scope of its water quality planning function." (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 98, 227 Cal.Rptr. 161.) According to the court, "the Board has the power and duty to provide water quality protection to the fish and wildlife that make up the delicate ecosystem within the Delta." (*Ibid.*) The appellate court also concluded that "the procedure followed-combining the water quality and water rights functions in a single proceeding-was unwise" because in doing so "the Board compromised its important water quality role by defining its scope too narrowly in terms of enforceable water rights." (*Id.* at pp. 119, 120, 227 Cal.Rptr. 161.)

Because the Board had already announced its "intention to conduct hearings during 1986 to establish new and revised" water quality objectives, the appellate court determined that "remand to the Board could serve no useful purpose." (*United States v. State Water Resources Control Bd., supra*, 182

Cal.App.3d at p. 120, 227 Cal.Rptr. 161.) Accordingly, the court reversed the judgment commanding the Board to reconsider the water quality control plan and instead simply expressed its expectation that "the renewed proceedings [would] be conducted in light of the principles and views expressed in [the court's] opinion." (*Ibid.*) As a result, Decision 1485 remained in effect.

A description of the next phase in the history of water quality control in the Delta can be found in the 1995 Bay-Delta Plan:

"In July 1987, the [Board] began proceedings to reexamine water quality objectives for the Bay-Delta Estuary and consider how water right permits would be modified to meet the new objectives. In May 1991, the [Board] adopted the 1991 Bay-Delta Plan with objectives for salinity, dissolved oxygen, and temperature. The 1991 Bay-Delta Plan was subsequently submitted to the U.S. Environmental Protection Agency (USEPA) for approval. In September 1991, the USEPA approved all of the salinity objectives for municipal, industrial, and agricultural beneficial uses, and the dissolved oxygen objective for fish and wildlife beneficial uses. The USEPA stated that the other fish and wildlife objectives were disapproved because of their failure to protect estuarine habitat and other fish and wildlife beneficial uses. As required under federal regulations [citation] when a state does not adopt changes in standards recommended by the USEPA upon notification of approval or disapproval of a state's standards, the USEPA initiated promulgation of water quality standards for the Bay-Delta Estuary. In January 1994, the USEPA published draft standards for the Estuary in the Federal Register [citation].

"To coordinate the parallel State and federal Bay-Delta resource management activities, the Governor's Water Policy Council of the State of California (Council) and the Federal Ecosystem Directorate (FED), comprised of State and federal

resource agencies collectively known as CALFED, entered into a Framework Agreement in June 1994. The purpose of the agreement is to establish a comprehensive program for coordination and communication between the Council and the FED regarding environmental protection and water supply dependability in the Bay-Delta Estuary and its watershed. The CALFED agreement identifies three areas where both State and federal interests and responsibilities are interrelated, and coordination and cooperation are particularly important: (1) formulation of water quality standards for the Estuary; (2) improved coordination of federal and State water project operations with regulatory requirements; and (3) development of a long-term solution to fish and wildlife, water supply reliability, flood control, and water quality problems in the Bay-Delta Estuary. In accordance with the Framework Agreement, the administrator of the USEPA signed final federal standards for the Estuary on December 14, 1994." (1995 Bay-Delta Plan, pp. 5-6, fn. omitted.)

Meanwhile, in March 1994, the Board commenced a proceeding to revise the water quality objectives for the Bay-Delta. During public workshops, the Board encouraged interested parties to develop alternatives for revising the objectives. Eventually, various representatives of the state and federal governments and certain urban, agricultural, and environmental interests reached agreement on recommendations to the Board for the revised objectives. This agreement is embodied in a document entitled "Principles for Agreement on Bay-Delta Standards between the State of California and the Federal Government" (principles for agreement), which was signed on December 15, 1994. Among the signatories were the Secretary of the California Resources Agency and the Secretary for the California Environmental Protection Agency.

The same day the principles for agreement were signed, the Board released the first draft of its new water quality control

plan for the Bay-Delta. The Board used several elements of the principles for agreement, as well other recommendations from interested parties, in preparing the draft plan.

B

The 1995 Bay-Delta Water Quality Control Plan

The Board adopted the new water quality control plan for the Bay-Delta in May 1995. The 1995 Bay-Delta Plan identified 17 beneficial uses, both within the Delta and throughout the state, to be served by the waters of the Delta. These uses fall into three broad categories: municipal and industrial, agricultural, and fish and wildlife. The 1995 Bay-Delta Plan then identified water quality objectives with respect to each of these categories of uses "to attain the highest water quality which is reasonable, considering all demands being made on the waters of the Estuary." The Board established various salinity objectives "for the reasonable protection of [agriculture as a beneficial use] from the effects of salinity intrusion and agricultural drainage in the western, interior, and southern Delta." To protect fish and wildlife uses, the Board's plan established objectives for six parameters: dissolved oxygen, salinity, amounts of Delta outflow, river flows, export limits, and Delta cross-channel gate operation. The plan also included a narrative objective for salmon protection. The objectives at issue in these coordinated cases are described below.

1. *The Southern Delta Salinity Objectives*

The Board adopted various salinity objectives in the plan (expressed as electrical conductivity or EC) to protect agricultural uses in the western, interior, and southern Delta. To protect agricultural uses in the southern Delta, the Board adopted salinity objectives to be met at four different locations: (1) San Joaquin River at Airport Way Bridge, Vernal-is (the Vernalis salinity objective); (2) San Joaquin River at Brandt Bridge; (3) Old River near Middle River; and (4) Old River at

Tracy Road Bridge. The 1995 Bay-Delta Plan specified the objectives as 0.7 EC from April through August and 1.0 EC from September through March at all four locations, but specified in a footnote that the objectives were to be met at the two Old River locations by December 31, 1997. (1995 Bay-Delta Plan, p. 17.)

2. *The Delta Outflow Objective*

Water flow can be regulated as a water quality objective because, as the Board explained in the 1995 Bay-Delta Plan, "the rate and quantity of flow . . . are physical properties or characteristics of the water" which "have an impact on the beneficial uses of" water in the Bay-Delta. (See § 13050, subd. (g).) Thus, a flow objective sets the amount of water that must be flowing in a watercourse at a given time "for the reasonable protection of beneficial uses of [the] water." (*Id.*, subd. (h).) Obviously, meeting such an objective may be achieved, among other ways, by reducing the amount of water that upstream water right holders divert from the watercourse or by increasing the amount of water released into the watercourse.

In the 1995 Bay-Delta Plan, the Board explained that "Delta outflow objectives are included for the protection of estuarine habitat for anadromous fishes and other estuarine-dependent species." The parameter for those objectives was the net delta outflow index (outflow index). The outflow index was a number representing the net amount of water flowing out of the Delta, which was to be calculated by taking the amount of water flowing into the Delta and subtracting from that figure the amount of water being consumed in the Delta and the amount of water being exported from the Delta. For example, every year in September, the 1995 Bay-Delta Plan required a minimum monthly average outflow index of 3,000 cubic feet per second (cfs) of water to be flowing out of the Delta to protect estuarine habitat within the Delta. (1995 Bay-Delta Plan, pp. 15, 19, 25.)

3. *The Vernalis Flow Objectives*

As part of the river flow objectives in the 1995 Bay-Delta Plan, the Board set minimum monthly average flow rates on the San Joaquin River at Vernalis (the Vernalis flow objectives). The Board explained that "Sacramento and San Joaquin river flow objectives are included to provide attraction and transport flows and suitable habitat for various life stages of aquatic organisms, including Delta smelt and chinook salmon." One part of the Vernalis flow objectives was a "pulse" flow during a 31-day period in April and May of each year (the Vernalis pulse flow objective). The 1995 Bay-Delta Plan called for an average flow rate during that period ranging from 3,110 to 8,620 cfs, depending on the type of water year and on certain salinity measurements.[13] The 1995 Bay-Delta Plan also specified that while the default period for the pulse flow was April 15 to May 15, "[t]his time period may be varied based on real-time monitoring. One pulse, or two separate pulses of combined duration equal to the single pulse, should be scheduled to coincide with fish migration in San Joaquin River tributaries and the Delta. The time period for this 31-day flow requirement will be determined by the operations group established under the Framework Agreement." (1995 Bay-Delta Plan, p.

4. *The Salmon Protection Objective*

The 1995 Bay-Delta Plan also included a narrative objective for the protection of salmon, which provided: "Water quality conditions shall be maintained, together with other measures in the watershed, sufficient to achieve a doubling of

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[13] The 1995 Bay-Delta Plan identified five different types of water years: wet, above normal, below normal, dry, and critical. For each water year, the 1995 Bay-Delta Plan specified two different flow objectives. According to the plan, "[t]he higher flow objective applies when the 2 ppt isohaline (measured as 2.64 mmhos/cm surface salinity) is required to be at or west of Chipps Island." (1995 Bay-Delta Plan, pp. 19, 21, 23.)

natural protection of chinook salmon from the average production of 1967-1991, consistent with the provisions of State and federal law." (1995 Bay-Delta Plan, p. 18.)

5. *The Program Of Implementation*

In addressing implementation of the objectives in the 1995 Bay-Delta Plan, the Board divided the program of implementation into "four general components: (1) measures within [the Board's] authority over water diversion and use which implement the water quality objectives; (2) measures requiring a combination of [the Board's] water quality and water rights authorities and actions by other agencies to implement the objectives; (3) recommendations to other agencies to improve fish and wildlife habitat conditions; and (4) a monitoring and special studies program." The Board then explained: "The specific actions identified within these components include time schedules for implementation, if appropriate. If no time schedule is included, implementation should be immediate." (1995 Bay-Delta Plan, p. 27.)

The Board included within the first component of its program of implementation the agricultural salinity objectives (with the exception of those for the protection of the southern Delta), the Delta outflow objectives, and the river flow objectives for the protection of fish and wildlife, including the Vernalis pulse flow objective. In describing "the nature of [the] actions . . . necessary to achieve the[se] objectives" (§ 13242, subd. (a)), the Board explained that it would "initiate a water rights proceeding following adoption of this water quality control plan" that would "address the water supply-related objectives in this plan through the amendment of water rights under the authority of the [Board]." According to the Board, "[t]he water right decision . . . will allocate responsibility for meeting the objectives among water rights holders in the Bay-Delta Estuary watershed and establish terms and conditions in appropriate water rights." The Board noted that pending adoption of that decision, which the Board

anticipated would occur before June 1998, "the [Bureau] intends to meet San Joaquin River flow requirements, in accordance with the March 6, 1995 U.S. Fish and Wildlife Service (USFWS) biological opinion for the threatened Delta smelt, which are consistent with the San Joaquin River flow objectives in this plan. These flows are interim flows and will be reevaluated as to timing and magnitude, up or down, within the next three years. During the three-year period, decisions by the FERC [the Federal Energy Regulatory Commission] or other regulatory orders may increase flows to the Estuary required of upstream water users. These flows will be considered by the [Board] in its allocation of responsibility among the water rights holders in the watershed during the water rights proceeding." (1995 Bay-Delta Plan, p. 29.)

The Board included within the second component of the program of implementation-"measures requiring a combination of [the Board's] water quality and water rights authorities and actions by other agencies to implement the objectives"—the agricultural salinity objectives for the southern Delta, including the Vernalis salinity objective. The Board explained: "Elevated salinity in the southern Delta is caused by low flows, salts imported in irrigation water by the State and federal water projects, and discharges of land-derived salts, primarily from agricultural drainage. Implementation of the objectives will be accomplished through the release of adequate flows to the San Joaquin River and control of saline agricultural drainage to the San Joaquin River and its tributaries. Implementation of the agricultural salinity objectives for the two Old River sites shall be phased in so that compliance with the objectives is achieved by December 31, 1997." (1995 Bay-Delta Plan, pp. 27, 29.)

With respect to the Vernalis salinity objective in particular, the Board explained: "This plan's objectives for flows in the San Joaquin River at Vernalis are expected to contribute to

achieving the salinity objectives in the southern Delta. Presently, the [Bureau] is responsible for meeting Vernalis salinity objectives through the release of water from New Melones Reservoir, as required under Water Right Decision 1422. Additional releases from other reservoirs for fish and wildlife protection in San Joaquin River tributaries may be required through ongoing FERC proceedings. Implementation of the [Board]'s Nonpoint Source Management Plan, adopted in 1988, and recommended activities of the multi-agency San Joaquin Valley Drainage Program (SJVDP), discussed below, will also contribute to achieving the salinity objectives. Additionally, the Central Valley [Regional Water Quality Control Board] should continue its salt load reduction program, initiated in response to adoption of the 1991 Bay-Delta Plan, to reduce annual salt loads discharged to the San Joaquin River by at least 10 percent and to adjust the timing of such discharges from low flow to high flow periods. These source control and drainage management measures will decrease the need for releases of water from New Melones. The [Board] will evaluate implementation measures for the southern Delta agricultural salinity objectives in the water rights proceeding." (1995 Bay-Delta Plan, p. 29.)

The plan also included, in the second component of the program of implementation, the narrative objective for salmon protection. The Board explained: "It is uncertain whether implementation of the numeric objectives in this plan alone will result in achieving the narrative objective for salmon protection. Therefore, in addition to the timely completion of a water rights proceeding to implement river flow and operational requirements which will help protect salmon migration through the Bay-Delta Estuary, other measures may be necessary to achieve the objective of doubling the natural production of chinook salmon from average 1967-1991 levels. This narrative objective is consistent with the anadromous fish doubling goals of the [Central Valley Project Improvement Act]; thus, prompt and efficient actions taken to

implement this [Central Valley Project Improvement Act] goal, in concert with other recommended actions in this plan, are important to achieving the narrative salmon protection objective. Monitoring results will be considered in the ongoing review to evaluate achievement of this objective and the development of numeric objectives to replace it." (1995 Bay-Delta Plan, pp. 28-29.)

In discussing the third component of the program of implementation-"recommendations to other agencies to improve fish and wildlife habitat conditions"—the plan recommended the development of "an experimental study program on the effects of pulse flows on fish eggs and larvae in the Delta." More specifically, the Board stated: "The [Department] and the [Bureau] should conduct experiments to investigate and evaluate the biological benefits of pulse flows to move planktonic fish eggs and larvae into Suisun Bay. These experiments, which should be conducted as soon as feasible, should: (1) involve flows released from both the Sacramento and San Joaquin rivers; (2) include real-time biological monitoring to determine the most favorable times for the pulse flows and the effects of the pulse flows on the eggs and larvae; (3) determine whether short-term pulse flows have a lasting benefit or whether, when outflows are reduced after a pulse flow, the larval fish are drawn back into interior Delta areas; and (4) take into account base flows and availability of water supplies. If results of the experiments were obtained soon enough, they could be used to refine potential pulse flow requirements in a water right decision implementing this water quality control plan." (1995 Bay-Delta Plan, p. 38.)

C

The Water Rights Proceeding To Implement The 1995 Bay-Delta Plan

In November 1997, the Board issued a draft environmental impact report for implementation of the 1995 Bay-Delta Plan

(the implementation EIR). The following month, the Board issued a notice of public hearing, setting hearing dates for the water rights proceeding in which the Board would allocate responsibility for implementing the flow-dependent objectives of the 1995 Bay-Delta Plan. (As discussed more fully below, this water rights proceeding also encompassed the petitions by the Bureau and the Department for certain changes in their CVP and SWP permits.)

Ultimately, the Board divided the public hearing into eight phases. The hearing convened on July 1, 1998, and continued off and on until July 6, 1999. On December 29, 1999, the Board certified the final implementation EIR and issued Decision 1641. On March 15, 2000, following the filing of various petitions for reconsideration, the Board issued its order denying petitions for reconsideration and amending SWRCB Decision 1641 (order on reconsideration) and issued the revised decision that we refer to as Decision 1641. (<http://www.waterrights.ca.gov /Decisions/D164 1rev.pdf> (as of Jan. 10, 2006).) With respect to its allocation of responsibility for meeting the flow-dependent objectives in the 1995 Bay-Delta Plan, we describe the most pertinent parts of Decision 1641 below.

1. *Responsibility For Meeting The Vernalis Flow Objectives—The San Joaquin River Agreement And The Vernalis Adaptive Management Plan*

In a revised notice of public hearing issued in May 1998, the Board explained that "[s]everal agreements have been negotiated among the parties interested in this proceeding, proposing allocations of responsibility to meet the flow-dependent objectives in the 1995 Bay-Delta Plan. The [Board] will receive evidence on these agreements during the hearing and will consider adopting water right terms and conditions consistent with these agreements." One such agreement was the proposed San Joaquin River Agreement-an agreement between "some, but not all, of the parties who

have an interest in the allocation of responsibility to provide the San Joaquin River's share of water for meeting the Bay-Delta flow objectives."[14] (Decision 1641, p. 18.)

As the Board explained in Decision 1641: "The [San Joaquin River Agreement] was presented to the [Board] as a settlement agreement proposing an allocation of responsibility for meeting the April-May objective for pulse flows from the San Joaquin River." "For a twelve-year period, the [San Joaquin River Agreement] proposes to allocate responsibility for meeting the April-May pulse flow objectives in the 1995 Bay-Delta Plan to certain water right holders in the watershed of the San Joaquin River." Under the San Joaquin River Agreement, "[t]he members of the [San Joaquin River Group Authority] who provide the water will receive $3 million per year from the [Bureau], . . . and $1 million per year from the [Department]. . . . The [San Joaquin River Agreement] would assign responsibility to the [Department] and the [Bureau] to meet the flows it specifies during the pulse flow period in the southern Delta." (Decision 1641, pp. 12, 17, 18.) In addition, "[t]he [Department] and the [Bureau] have committed themselves to provide 'backup' during the term of the [San Joaquin River Agreement] for any responsibility that otherwise would be placed on the San Joaquin basin water right

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[14] As relevant here, the parties to the San Joaquin River Agreement included: (1) San Joaquin River Group Authority and its member agencies, Modesto Irrigation District, Turlock Irrigation District, Merced Irrigation District, South San Joaquin Irrigation District, and Oakdale Irrigation District; (2) San Joaquin River Exchange Contractors Water Authority and its member agencies, Central California Irrigation District, San Luis Canal Company, Firebaugh Canal Water District, and Columbia Canal Company; (3) Friant Water Users Authority; (4) the City and County of San Francisco; (5) State Water Contractors; (6) Kern County Water Agency; and (7) Metropolitan Water District of Southern California.

holders as a result of an allocation of responsibility in the Bay-Delta Water Rights Hearing."[15] *(Id.*, p. 18, fn. 26.)

The San Joaquin River Agreement, however, did not provide sufficient flows to meet all of the Vernalis flow objectives in the 1995 Bay-Delta Plan. Nevertheless, to induce the Board to approve the San Joaquin River Agreement as part of Decision 1641, the Bureau and the Department committed to provide additional water, beyond what was required by the agreement, to meet all of the Vernalis flow objectives *except* the Vernalis pulse flow objective.

The reason the parties to the San Joaquin River Agreement were not proposing to meet the Vernalis pulse flow objective was ostensibly to conduct an experiment known as the Vernalis Adaptive Management Plan, which had been developed "to gather better scientific fisheries information on the lower San Joaquin River"-specifically, "information on the relative effects of flows in the San Joaquin River, CVP and SWP pumping rates, and operation of a fish barrier at the head of Old River on the survival and passage of salmon smolts through the Delta." According to the San Joaquin River Agreement, the flows and pumping regimen provided for in the agreement would not only allow the conduct of the Vernalis Adaptive Management Plan but would "provide environmental benefits in the lower San Joaquin River and Delta at a level of protection equivalent to the San Joaquin River Portion of the" 1995 Bay-Delta Plan.

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[15] In the absence of the San Joaquin River Agreement, the Board could have ordered water right holders upstream from Vernalis (in addition to the Bureau) to provide water to help meet the Vernalis flow objectives throughout the year. Thus, it was not inappropriate for the Bureau and those other water right holders to agree among themselves on a plan for releases to meet the flow objectives. Of course, as we will explain further below, in approving any such agreement, the Board was obligated to ensure that the flow objectives were, in fact, met.

To implement the San Joaquin River Agreement, four petitions were filed for long-term changes in licenses held by Merced, Turlock, Modesto, Oakdale, and South San[16] Joaquin Irrigation Districts (the irrigation districts). The petitions proposed to add the San Joaquin River upstream of Vernalis as a place of use and add fish and wildlife enhancement as a purpose of use. These changes would allow these irrigation districts to contribute water toward the Vernalis pulse flow.

As Decision 1641 explained: "Pursuant to the [San Joaquin River Agreement], [the irrigation districts] along with the [San Joaquin River Exchange Contractors Water Authority] would provide up to 110 taf [thousand acre-feet] per year during a 31-day pulse flow period in April and May of each year, for instream flows in the lower San Joaquin River above Vernalis. . . . The [irrigation districts] and the Exchange Contractors would decide each year how to allocate the water required during the pulse flow period." (Decision 1641, p. 14, fn. omitted.)

In evaluating the Vernalis Adaptive Management Plan, the Board concluded it provided "a unique opportunity for collecting data under controlled conditions because of the commitment of the [Department] and [the Bureau] to control exports and releases from New Melones Reservoir, and operate the head of Old River barrier as needed for the experiment." (Decision 1641, p. 21.) The Board also noted, however, that "[t]here are differences in the flow targets between the [Vernalis Adaptive Management Plan] and the [San Joaquin River Agreement]," and "the [San Joaquin River Agreement] does not fully provide for conducting the experiment as designed." (*Id.*, pp. 20, 22.) Among other things, "the [San Joaquin River Agreement] provides flow

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[16] A change petition was also filed by the San Joaquin River Exchange Contractors Water Authority for changes in certain pre-1914 water rights, but that petition was later withdrawn as unnecessary.

targets of 2,000 cfs, but the minimum flow targets under the [Vernalis Adaptive Management Plan] are 3,200 cfs." (*Id.*, p. 20, fn. omitted.) The Board "urges the [Bureau] to supplement the flows required under the [San Joaquin River Agreement] as needed to ensure that the experiment is completed," but the Board did not require the Bureau to do so. (*Id.*, p. 22.)

In evaluating the San Joaquin River Agreement, the Board declined a request by its proponents to find that the agreement provided environmental protection equivalent to the Vernalis pulse flow objective in the 1995 Bay-Delta Plan. According to the Board: "A finding of equivalent protection would be premature at this time. The purpose of the [San Joaquin River Agreement] and [the Vernalis Adaptive Management Plan] is to determine through experimentation alternative measures to protect the beneficial uses in the 1995 Bay-Delta Plan designated to be protected by the Vernalis pulse flow objectives. Until the experiment is complete, there will not be adequate information to know whether the measures provide equivalent protection." (Decision 1641, p. 23.)

The Board went on to note that "the Vernalis flow objectives in the 1995 Bay-Delta Plan do not contain a provision allowing a different set of objectives to be met if it is demonstrated that they provide equivalent protection for the beneficial uses protected by the objectives. In cases where equivalent protection can be provided, the objectives normally so state. Instead of providing for equivalent protection, the 1995 Bay-Delta Plan provides that the Vernalis flow objectives will be reevaluated in a future review of the plan." (Decision 1641, p. 23.)

The Board candidly acknowledged that "[m]eeting the flows specified in the [Vernalis Adaptive Management Plan] will not meet the pulse flow objectives" in the 1995 Bay-Delta Plan and "it is not certain that the [Vernalis Adaptive Management Plan] will provide protection for the chinook

salmon equivalent to that provided by the objectives." Nonetheless, the Board "approves the [San Joaquin River Agreement] for the purpose of conducting the [Vernalis Adaptive Management Plan] experiment" on the theory that "[u]nder *Water Code section 13242*, an objective can be implemented in stages over a period of time" and "[t]he [Vernalis Adaptive Management Plan] experiment . . . will serve as a step toward implementation of the Vernalis pulse flow objectives." According to the Board, by approving the agreement, it was "authoriz[ing] a staged implementation of the Vernal-is pulse flow objectives so that experimental operations can be conducted in lieu of meeting the objectives as the first stage of implementation." (Decision 1641, pp. 23, 24, 48.)

To allow for performance of the San Joaquin River Agreement, the Board in Decision 1641 amended two of the Bureau's permits for New Melones storage to require the Bureau to meet the Vernalis flow objectives during the term of the agreement, with the exception of the Vernalis pulse flow objective. In lieu of the Vernalis pulse flow objective, the Bureau was required to meet the alternate pulse flow objectives from the agreement. The Board specifically explained that this was an interim requirement and that it would "consider a permanent allocation of responsibility with respect to the San Joaquin River basin after the [San Joaquin River Agreement] has expired." The new permit term provided that "[i]f the San Joaquin River Agreement . . . is dissolved by the signatory parties before it expires, then Permittee shall meet the San Joaquin River flow objective set forth in [the 1995 Bay-Delta Plan] until the Board establishes alternative implementation of the San Joaquin River flow." (Decision 1641, pp. 132, 162.) The Board also explained that the Bureau was not required to "use water under [the New Melones] permits to meet [the Vernalis flow objectives] if it uses other sources of water or other means to meet these" objectives. (*Id.*, p. 160, fn. 87.)

The Board also approved the petitions by the irrigation districts to add the San Joaquin River upstream of Vernalis as a place of use and add fish and wildlife enhancement as a purpose of use in their licenses during the period of the San Joaquin River Agreement. Consistent with the terms of the San Joaquin River Agreement, the Board required the irrigation districts to contribute up to 110,000 acre-feet of water annually toward the alternate pulse flow objectives from the agreement. The Board further specified that "[w]hen the [San Joaquin River Agreement] expires or is terminated, the Board will give notice and will commence a proceeding to determine the responsibility of the [irrigation districts] to meet the objectives." (Decision 1641, p. 166.)

2. *Responsibility For Meeting The Southern Delta Salinity Objectives*

In Decision 1641, the Board determined that salinity concentrations at Vernalis are caused by "a combination of upstream water diversions, discharges of saline drainage water to the San Joaquin River and subsurface accretions to the river from groundwater." The Board further determined "that the actions of the CVP are the principal cause of the salinity concentrations exceeding the objectives at Vernal is." This is so because "[t]he source of much of the saline discharge to the San Joaquin River is from lands on the west side of the San Joaquin Valley which are irrigated with water provided from the Delta by the CVP," and "[t]he capacity of the lower San Joaquin River to assimilate the agricultural drainage has been significantly reduced through the diversion of high quality flows from the upper San Joaquin River by the CVP at Friant." (Decision 1641, pp. 80, 83.)

Because the Board viewed the CVP as the cause of the salinity concentration at Vernalis, the Board required the Bureau to meet the Vernalis salinity objective. The Board specified that the Bureau would have "wide latitude in developing a program to achieve this result" and "could consider

sources of dilution water other than New Melones Reservoir and other means of reducing the salinity concentration in the southern Delta." To this end, the Board inserted a condition in all of the Bureau's CVP permits, except those relating to New Melones, which "conditioned [those permits] on implementation of the water quality objectives for agricultural beneficial uses in the southern Delta," including the Vernal-is salinity objective. This condition specified that the Bureau could meet the Vernalis salinity objective "through flows or other measures."

The Board added a term to the two New Mel-ones storage permits, which provided that "[i]n conjunction with other measures to control salinity, Permittee shall release water from New Melones Reservoir to maintain the Vernalis agricultural salinity objective." The Board added a condition to the New Melones direct diversion permit which provided that "[f]or the protection of water quality, no diversion is authorized for consumptive uses under this permit unless [the Vernalis salinity objective] is met . . . ." In all three of these New Melones permits, Decision 1641 specified that the Bureau could "meet these objectives through flows or other measures." In addition, in the two New Melones storage permits, the Board provided that the Bureau did not have to "use water under these permits to meet [the Vernalis salinity objective] if it uses other sources of water or other means." (Decision 1641, pp. 160 & fn. 87, 161, 162.)

With respect to the three other agricultural salinity objectives for the southern Delta downstream of Vernalis, the Board determined the Department and the Bureau were partially responsible for the salinity problems at those locations because of export pumping. Decision 1641 noted that "[m]easures that affect circulation in the Delta, such as barriers, can help improve the[se] salinity concentrations" and that the Department and the Bureau were working together on a barrier program. The Board amended all of the Depart-

ment's SWP permits and all of the Bureau's CVP permits to require the Department and the Bureau to implement the salinity objectives at the three locations. The Board, however, did not require immediate implementation of the 0.7 EC objective for April through August at any of the three locations. Instead, in a revision to the footnote in the 1995 Bay-Delta Plan that previously allowed the salinity objectives at the two Old River locations to be implemented by December 31, 1997, the Board now specified that at all three locations the 0.7 EC objective "becomes effective on April 1, 2005" (Decision 1641, Table 2, p. 182, fn [5]) and that the Department and the Bureau were to meet the 1.0 EC objective year round until that date. The Board further specified: "The 0.7 EC objective is replaced by the 1.0 EC objective from April through August after April 1, 2005 if permanent barriers are constructed, or equivalent measures are implemented, in the southern Delta and an operations plan that reasonably protects southern Delta agriculture is prepared by the [Department] and the [Bureau] and approved by the Executive Director of the [Board]. The [Board] will review the salinity objectives for the southern Delta in the next review of the Bay-Delta objectives following construction of the barriers." (*Ibid.*)

3. *Responsibility For Meeting The Delta Outflow Objective*

The Board assigned responsibility for meeting the Delta outflow objective to both the Bureau and the Department by adding a term to all of the CVP and SWP licenses and permits, requiring the Bureau and the Department to ensure that the Delta outflow objective was met "on an interim basis . . . until the Board adopts a further decision in the Bay-Delta Water Rights Hearing 7 assigning responsibility for meeting these objectives."[17]

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[17] Decision 1641 provided that the interim period would expire "not later than November 30, 2001." In April 2001, however, the Board

III

The Joint Points Of Diversion Petition And The Change Petition

In addition to allocating responsibility for meeting the flow-dependent objectives in the 1995 Bay-Delta Plan, the Board used the public hearing held between July 1998 and July 1999 to consider petitions by the Department and the Bureau for certain changes in their water right permits. To better understand the issues raised by those petitions, a brief review of California law on the appropriation of water is necessary.

To acquire the right to appropriate water, "an application for appropriative rights must . . . be made to the Board for a permit authorizing construction of necessary water works and the taking and use of a specified quantity of water." (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 102, 227 Cal.Rptr. 161.) Among other things, an application for a permit to appropriate water must include "[t]he nature and amount of the proposed use," "[t]he proposed place of diversion," and "[t]he place where it is intended to use the water." (§ 1260, subds.(c), (e), (f).)

The Board "shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." (§ 1253.) "The issuance of a permit gives the right to take and use water only to the extent and for the purpose allowed in the permit." (§ 1381.) "Water appropriated . . . for one specific purpose shall not be deemed to be appropriated for any other or different purpose, but the purpose of the use

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adopted Order WR 2001-05, which eliminated this deadline and provided that the interim period would continue until the Bureau or the Department filed a written request for the Board to convene a further water right proceeding.

of such water may be changed as provided in [the Water C]ode." (§ 1700.)

"At any time after notice of an application is given, an applicant, permittee, or licen*See* may change the point of diversion, place of use, or purpose of use from that specified in the application, permit, or license; but such change may be made only upon permission of the board." (§ 1701.) "Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved." (§ 1702.)

With that legal framework in mind, we turn to the petitions at issue here.

A

The Joint Points Of Diversion Petition

In the late 1970's and early 1980's, the Bureau filed petitions for temporary use of the SWP's pumping plant in the southern Delta to take advantage of excess capacity at that plant. In Decision 1485, which the Board implemented in 1979 (and which remained in effect through the adoption of Decision 1641), the Board authorized the Bureau to use the SWP's pumping plant to make up export deficiencies caused by limits imposed on the Bureau's pumping plant in May and June of each year for the protection of striped bass.

In December 1981, the Bureau filed a petition for the permanent right to use the SWP's pumping plant. In 1985, the Bureau renewed this request in its petition to consolidate and expand the places of use in 15 of its CVP permits (discussed more fully below). Finally, in February 1995, the Bureau and the Department filed with the Board a petition to add to the permits for the CVP and the SWP "points of diversion and rediversion at each project's diversion facilities in the southern Delta to allow the projects to use those facilities

interchangeably" (the joint points of diversion petition). Specifically, the Bureau sought to add the SWP's Harvey O. Banks Delta Pumping Plant as a point of diversion and rediversion in the permits for the CVP, and the Department sought to add the CVP's Tracy Pumping Plant as a point of diversion and rediversion in the permits for the SWP.

In the water rights proceeding underlying these coordinated cases, the Board addressed the requests for joint points of diversion made in 1981, 1985, and 1995. The draft implementation EIR issued by the Board in November 1997 included an analysis of the potential environmental impacts of granting the joint points of diversion petition. The revised notice of public hearing issued by the Board in May 1998 gave notice that phase 6 of the hearing would address the joint points of diversion petition.

The Board received evidence regarding the joint points of diversion petition over seven days in May 1999. As previously noted, the Board certified the implementation EIR on December 29, 1999. In Decision 1641, the Board approved the joint points of diversion petition in three stages, imposing "[o]perations plans and other requirements . . . on changes in use of the [joint points of diversion] from one stage to the next. The operations plan must be protective of fish and wildlife and of the rights of other legal users of water. It will be subject to approval of the Chief of the Division of Water Rights of the [Board]. With these requirements, the [joint points of diversion] will not cause injury to other legal users of the water, and will not have a significant effect on the environment." (Decision 1641, p. 91.)

B

The Change Petition

In September 1985, the Bureau filed a petition with the Board to consolidate and expand the places of use in 15 of its CVP permits (the change petition). In its petition, the Bureau

offered the following explanation for the expansion aspect of its request:

> "The expansion requested is to resolve several problems. The first is that when boundaries of the existing places of use were established, small-scale maps were used, and the irrigable areas of the valley floor were not completely covered. As a result, the areas served by the CVP have expanded to that boundary and have, in fact, gone beyond the boundary in a number of places. This presents a dilemma to the United States in that to supply these areas in fulfillment of the commitment to meet inbasin demands, such service may be in technical noncompliance with the project's water rights. The expansion resolves this problem.

"The second is that certain areas that were authorized to and now receive CVP service were not included in the existing place of use. Notably, certain parts of the San Luis Unit and of the Sacramento Valley Canals Unit as authorized by Congress are not within the existing place of use. The expansion of the place of use will conform it to the CVP service area intended by various [Congressional] authorizations. This expansion also anticipates certain future authorizations for areas which can logically and easily be served by the CVP."

The Bureau proposed a new consolidated and expanded place of use, the boundary of which "generally follows township and range lines, section lines, county lines, or physical boundaries such as stream channels or watersheds."

In February 1986, the Bureau amended the change petition to incl[illegible] a request to conform the purposes of use in 19 of its CVP permits. The Board described that amendment as follows: "Most of the 19 permits authorize the same major purposes of use. However, different minor purposes of use are authorized in several of the permits. An amendment to the

petition requests that the purposes of use be amended and conformed so that permitted uses of water from all sources are the same."

In June 1995, the Bureau further amended the change petition to exclude three of the 19 permits. Thus, the Bureau ultimately sought to conform the purposes of use in 16 of its permits. At that time, only two of those 16 permits (permits Nos. 11969 and 11973, both involving the Trinity River) listed "fish & wild life enhancement" or "fish & wildlife propagation" as an authorized purpose of use.

The Bureau explained its request to conform the purposes of use in its permits as follows:

> "[The Bureau] received assignments of state-filed applications or filed applications for water rights in accordance with acceptable practices at the time the various facilities of the CVP were being planned. It was necessary at the time to request separate permits for different beneficial uses. With the magnitude of the CVP and its integrated operations, however, it was not practical to try to match up a particular beneficial water use to a specific permit. In addition, in 1992, Congress passed the Central Valley Project Improvement Act (CVPIA), which amended the CVP authorizations to include fish and wildlife mitigation, protection and restoration purposes. Consequently, it is important that all of the CVP permits in this petition include the state-defined beneficial use of 'fish and wildlife preservation and enhancement' to maximize operational flexibility in order to comply with the CVPIA. [The Bureau] requests that the 16 CVP permits in this petition be amended so that each permit includes the following beneficial uses: irrigation, domestic, municipal, industrial, frost protection, heat control, fish and wildlife preservation and enhancement, salinity control, water quality control, stockwatering and recreation. No changes in operations

> are contemplated as a result of this request. The Central Valley Project will continue to be operated according to federal legislation including the CVPIA and our water service and settlement contractual arrangements as well as our permit conditions."

Also in June 1995, the Bureau amended the change petition to request that the place of use in its permits be changed only "to conform to the authorized service areas of districts with existing long-term water service contracts with [the Bureau]." The Bureau characterized this request as one to "conform" or "correct" the existing place of use boundary, rather than as a request to expand that boundary.

In connection with this amendment, the Bureau took "the existing boundary lines on the maps submitted with [the Bureau's] various CVP [water right] applications" and "digitized" those lines through the Bureau's GIS (geographical information system) to create a single line. The Bureau then compared the area inside that line to the authorized district services areas of its contractors and determined that "[t]he present service areas of 26 of [the Bureau's] contractors have some lands outside of the existing place of use boundary as now defined by [the Bureau's] GIS system." One of those districts was Santa Clara Valley Water District (Santa Clara); another was Westlands.

In December 1997, the Board released a draft EIR for the change petition (the change EIR). In analyzing the potential significant environmental effects of approving the Bureau's request to conform the places of use in its permits to the authorized district service areas, the change EIR distinguished between "encroachment" lands and "expansion" lands. The change EIR defined encroachment lands as "lands that have already received CVP water within the 26 CVP water contractor service areas but are presently outside the authorized [place of use]." Expansion lands were defined as "lands outside the authorized [place of use] that have never received

CVP water but are entitled to service under one of the existing 26 CVP water contracts." The change EIR explained that "[e]ncroached lands are discussed at the project-specific level," but "[p]otential environmental impacts associated with the expansion areas are discussed on a programmatic level because future land and water uses cannot be readily determined at this time, and would require speculation. Prior to [Board] authorization for delivery of CVP water to expansion lands, more detailed site-specific environmental analysis and site-specific environmental documentation meeting CEQA requirements may be required." Elsewhere, the change EIR stated: "At present the [Board] and [the Bureau] do not know where water may be used and for what purposes by contractors on the expansion lands. Therefore, no approval to deliver water to expansion lands can be granted until adequate site-specific environmental documentation on expansion land water delivery proposals are completed."

With respect to the encroachment lands, the change EIR determined that "the development and land use conversion of 49,602 acres was facilitated by delivery of CVP water," resulting in the alteration of six different kinds of natural habitat. The change EIR concluded that "[t]he impact to these habitats and the associated wildlife species, designated as endangered or threatened in accordance with federal and state endangered species protection mandates, is considered a significant adverse impact" and that "[m]itigation for compensating past impacts to encroachment lands must provide similar environmental/habitat values that were associated with the affected lands." The change EIR further observed that "[the Bureau] is currently implementing several programs capable of achieving the mitigation requirements described in the PEIR [*sic*]. These programs consist of ongoing, adaptive management efforts that will, overtime [*sic*], restore, create and maintain targeted environmental habitat values which would mitigate impacts associated with the construction and operation of the CVP. This program is recognized by the

[Board] as the appropriate means to obtain mitigation for the impacts to encroachment lands, provided that portions of the funds and management efforts of these ongoing programs would be specifically assigned to mitigating those environmental/habitat values adversely affected by the encroachment of CVP water supplies to the 49,602 acres outside the authorized [place of use]."

The revised notice of public hearing issued by the Board in May 1998 gave notice that phase 7 of the public hearing would address the change petition. "During Phase 7, it became apparent that the maps prepared by the [Bureau] to depict the boundaries of the currently authorized places of use were not consistent with the official place of use maps in the files of the [Board]. [¶] Consequently, the [Board] received in evidence the official place of use maps and based its technical analysis on a comparison of the official maps with the areas currently being served by the CVP . . . . The analysis shows that seven of the twenty-six CVP contractors whose use of water was addressed in the [draft change EIR] as encroachment outside the place of use are entirely within the current place of use." (Decision 1641, p. 118.)

Under the Board's revised analysis, Santa Clara-which has a total service area of 835,200 acres-included 20,912 acres of encroachment lands and 561,199 acres of expansion lands. Westlands-which has a total service area of 605,548 acres-included 30,718 acres of encroachment lands and 9,664 acres of expansion lands.

The Board certified the final change EIR on December 29, 1999.

In Decision 1641, the Board determined the expansion lands could not "be added to the CVP place of use at this time" because the change EIR "analyze[d] the environmental effects of expansion at the programmatic level, which does not provide enough information to approve the expansion

areas under CEQA." The Board noted that these areas "can be added on a case-by-case basis in the future, subject to appropriate CEQA documentation and the approval of the [Board] under *Water Code section 1700*, et seq., or other provisions of the Water Code." (Decision 1641, p. 121.)

The Board approved the addition of all the encroachment lands to the authorized place of use in the Bureau's permits, but imposed habitat mitigation requirements on the Bureau "for all the encroachment land that was first converted to irrigated agriculture due to CVP water deliveries" unless the Bureau could demonstrate the particular encroachment in question was "not subject to CEQA because it occurred before the effective date of CEQA, or that an exemption from mitigation requirements is justified because the impacts of encroachment have already been mitigated."

With respect to the Bureau's request to conform the purposes of use in its permits, the Board approved that request (over Westlands's objection), which had the effect of adding fish and wildlife enhancement as an authorized purpose of use in 14 of the Bureau's permits. (Decision 1641, pp. 122-130.)

IV

The Trial Court Proceedings

In January 2000, following the Board's issuance of its original Decision 1641 but before its issuance of the revised decision, four mandamus petitions were filed challenging the Board's decision: (1) *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 309539); (2) *Anderson v. State Water Resources Control Board* (Super. Ct. Fresno County, 2003, No. 645385-6); (3) *San Luis Water District v. State Water Resources Control Board* (Super. Ct. Merced County, 2002, No. 143845); and (4) *Glenn-Colusa Irrigation District v. State Water Resources Control Board* (Super.Ct.Sac.County,

2000, No. 00CS00201). The Board petitioned to have the four cases coordinated. (See *Code Civ. Proc., § 404* et seq.) In April 2000, the Chief Justice of California and Chair of the Judicial Council authorized the presiding judge of the Sacramento County Superior Court to assign a coordination motion judge to determine whether coordination of the four actions was appropriate. The Judicial Council gave the coordination proceeding the special title of "SWRCB Cases."

Meanwhile, that same month, following the Board's issuance of its revised Decision 1641 in March 2000, another seven mandamus petitions were filed challenging the Board's actions: (1) *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502); (2) *County of San Joaquin v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311499); (3) *Golden Gate Audubon Society v. State Water Resources Control Board* (Super. Ct. Alameda County, 2003, No. 825585-9); (4) *Pacific Coast Federation of Fishermen's Associations v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311507); (5) *Santa Clara Valley Water District v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311549); (6) *State Water Contractors v. State Water Resources Control Board* (Super.Ct.Sac.County, 2001, No. 00CS00602); and (7) *Westlands Water District v. State Water Resources Control Board* (Super.Ct.Sac.County, 2003, No. 00CS00603).

In May 2000, the presiding judge of the Sacramento County Superior Court assigned Judge Brian R. Van Camp as the coordination motion judge for the first four cases. In July 2000, Judge Van Camp ordered the cases coordinated, designated this court as the reviewing court with appellate jurisdiction and recommended that the coordinated proceeding be assigned to the Sacramento County Superior Court.

In August, the Chief Justice of California and Chair of the Judicial Council authorized the presiding judge of the Sacramento County Superior Court to assign a coordination trial judge. The presiding judge assigned the coordinated proceeding to Judge Roland L. Candee.

In September 2000, *Glenn-Colusa Irrigation District v. State Water Resources Control Board* (Super.Ct.Sac.County, 2000, No. 00CS00201) was dismissed by stipulation, leaving three cases in the coordinated proceeding.

The next month, the Board filed a petition for coordination of the seven additional cases filed in April 2000 as add-on cases. (See Cal. Rules of Court, rule 1544.) In November 2000, the trial court ordered those seven cases coordinated with the three remaining original cases.

Over the next two and one-half years, two more of the coordinated cases-*State Water Contractors v. State Water Resources Control Board* (Super.Ct.Sac.County, 2001, No. 00CS00602) and *San Luis Water District v. State Water Resources Control Board* (Super. Ct. Merced County, 2002, No. 143845)-were dismissed, leaving eight cases.

In May 2003, the trial court issued its statement of decision in the coordinated cases. The trial court upheld Decision 1641 with two exceptions.

First, the court concluded that "while the [Vernalis Adaptive Management Plan] and the [San Joaquin River Agreement] are appropriate and permissible steps toward implementation of the 1995 [Bay-Delta] Plan, they do not satisfy at all times of the year the flow requirements of the 1995 Plan. These are the legal minimum flow objectives that must be satisfied unless changed in an appropriate proceeding to modify the 1995 Plan itself." Accordingly, the court granted relief on the twelfth cause of action in the mandamus petition in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No.

311502) and ordered that a writ issue directing the Board to conduct further proceedings to fully assign responsibility for meeting all of the flow objectives in the 19958 ay-Delta Plan or modify the objectives in the plan.[18]

Second, the trial court concluded that when the Legislature merged Westlands with another water district in 1965, "the [L]egislature effectuated a statutory authorization for the delivery of federal CVP water to all of the lands of the combined . . . district." Accordingly, the trial court granted the mandamus petition in *Anderson v. State Water Resources Control Board* (Super. Ct. Fresno County, 2003, No. 645385-6) and ordered the issuance of a writ directing the Board to conform the places of use under the Bureau's CVP permits to include both the encroachment and expansion lands within Westlands without any mitigation requirement.

Judgments in seven of the coordinated cases were entered on June 19, 2003. The judgment in the eighth case (*Anderson*) was entered on July 16, 2003.

Eight timely notices of appeal and three timely notices of cross-appeal were filed in seven of the cases. No appeal was taken in *Pacific Coast Federation of Fishermen's Associations v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311507).

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[18] "To allow for certainty" while the Board responded to the writ, the trial court further ordered the parties "to comply with any and all obligations to meet flow objectives to the same extent as if [Decision] 1641 had been fully validated by th[e][c]ourt until further order by the [Board] or th[e] [c]ourt."

In a similar vein, on October 14, 2003, this court granted the Board's request for relief from the automatic stay on appeal of the trial court's decision and ordered that "Water Rights Decision 1641 shall remain in full effect during the pendency of this appeal."

DISCUSSION

I

Standard OfReview

We begin our discussion by setting out the standards of review that apply to the appeals in these coordinated cases.

A

Water Rights Decisions

"In undertaking to allocate water rights, the Board performs an adjudicatory function." (*United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 113, 227 Cal.Rptr. 161.) Accordingly, Code of Civil Procedure section 1094.5 applies to a writ proceeding *See*king to challenge a water rights decision by the Board. (§ 1126) "The inquiry in such a case shall extend to the questions whether the [Board] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [Board] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ Proc , § 1094 5, subd (b).) "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (*Id.,* subd. (c).)

The trial court is authorized by law to exercise its independent judgment on the evidence when "the right or interest affected by the administrative decision is a 'vested' one." (*Merrill v. Department of Motor Vehicles* (1969) 71

Cal.2d 907, 914, 80 Cal.Rptr. 89, 458 P.2d 33, fn. omitted.) "If the right affected is 'vested' the decision is reviewed by means of a limited trial de novo in which the trial court not only examines the record for errors of law but also exercises its independent judgment upon the weight of the evidence produced before the administrative agency together with any further evidence properly admitted by the court. [Citations.] If, on the other hand, the right is not 'vested' the trial court's scope of review extends only to matters of law appearing on the record of the administrative proceeding, and accordingly its review of the evidence produced below is limited to a determination of whether it is legally sufficient to sustain the decision." (*Id.* at pp. 914-915, 80 Cal.Rptr. 89, 458 P.2d 33, fns. omitted.)

"In a case wherein the trial court is authorized to conduct a limited trial de novo . . . the province of the appellate court is analogous to that assumed by it in an ordinary civil appeal: only errors of law are subject to its cognizance, and a factual finding can be overturned only if the evidence received by the trial court, including the record of the administrative proceeding, is insufficient as a matter of law to sustain the finding. [Citations.] In a case wherein no limited trial de novo is authorized by law, however, the trial court itself exercises an essentially appellate function in that only errors of law appearing on the administrative record are subject to its cognizance. In such a case, therefore, the trial and appellate courts occupy identical positions with regard to the administrative record, and the function of the appellate court, like that of the trial court, is to determine whether that record is free from legal error." (*Merrill v. Department of Motor Vehicles, supra*, 71 Cal.2d at pp. 915-916, 80 Cal.Rptr. 89, 458 P.2d 33.)

Of course, questions of law are subject to de novo review. (E.g., *Pollak v. State Personnel Bd.* (2001) 88 Cal.App.4th 1394, 1404, 107 Cal.Rptr.2d 39.) The proper interpretation of

a statute, and its application to undisputed facts, is a question of law. (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 357, 127 Cal.Rptr.2d 516, 58 P.3d 367.)

The Board argues that the interpretations it has given to various Water Code provisions in Decision 1641 and its order on reconsideration are entitled to deference and "should not be overturned, unless clearly erroneous." We disagree. As our Supreme Court recently explained:

> "An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to 'make law,' and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. Justice Mosk may have provided the best description when he wrote . . . that '"The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other." [Citation.] Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum.' . . .

"Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's

interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. [Citation.] Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, 'The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.'" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

Based on the foregoing, in interpreting the various Water Code provisions at issue in this case, we will exercise our independent judgment, giving deference to the Board's interpretation only if the Board shows that such deference is warranted by the circumstances.

B

CEQA Actions

In a mandate proceeding to review an agency's decision for compliance with CEQA, we review the administrative record to determine whether the agency abused its discretion. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 116-117, 104 Cal.Rptr.2d 326.) "Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375, 43 Cal.Rptr.2d 170.) "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law' and has therefore abused its discretion." (*Save Our Peninsula Committee*, at p. 118, 104 Cal.Rptr.2d 326.) Furthermore, "when an agency fails to

proceed as required by CEQA, harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946, 91 Cal.Rptr.2d 66.)

"In reviewing an agency's decision to certify an EIR, we presume the correctness of the decision. The project opponents thus bear the burden of proving that the EIR is legally inadequate." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors, supra,* 87 Cal.App.4th at p. 117, 104 Cal.Rptr.2d 326.) However, "[w]hile we may not substitute our judgment for that of the decision makers, we must ensure strict compliance with the procedures and mandates of the statute." (*Id.* at p. 118, 104 Cal.Rptr.2d 326.)

II

Challenges To Implementation Of The 1995 Water Quality Control Plan For The Bay-Delta

A

The Central Delta Parties' Challenges To Implementation Of The 1995 Bay-Delta Plan

In April 2000, six parties with interests in the central Delta[19] filed a petition for writ of mandate *See*king to va cate Decision 1641 on non-CEQA grounds.[20] (*Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).) This

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[19] Those parties are Central Delta Water Agency, R.C. Farms, Inc., Reclamation District No. 2072, Reclamation District No. 2039, Zuckerman-Mandeville, Inc., and South Delta Water Agency. We will refer to them collectively as the Central Delta parties.

[20] The Central Delta parties also filed a writ petition limited to CEQA issues, which we discuss later in this opinion.

Central Delta case was one of the cases added to the coordinated proceeding in November 2000.

The Central Delta parties' non-CEQA writ petition raised many issues, most of which we address directly below. Some of the issues we will address later, in conjunction with related issues raised by other parties.

1. *Challenges To The San Joaquin River Agreement*

a. *Implementing The Vernalis Pulse Flow Objective And The Southern Delta Salinity Objectives*

In the twelfth cause of action in their non-CEQA writ petition, the Central Delta parties alleged, among other things, that in adopting Decision 1641, the Board "failed to implement the 1995 Water Quality Control Plan," including the "Vernalis Salinity objectives" and the "Vernalis Fish Flow objectives." They further alleged that the Board "wrongfully modified" the 1995 Bay-Delta Plan "through inadequate implementation."

Although acknowledging that "[m]any factors weigh in support of" the San Joaquin River Agreement and the Vernalis Adaptive Management Plan, the trial court concluded the Vernalis flow objectives were "the legal minimum flow objectives that must be satisfied unless changed in an appropriate proceeding to modify the 1995 Plan itself." The court explained that "[t]o sanction the Board's action here would effectively allow the Board to change the no longer challengeable 1995 Plan's objectives unilaterally without completing the necessary legal steps allowing for interested parties' input, comments, and challenges." Accordingly, the court entered a judgment granting the Central Delta parties' mandamus petition "on the ground that the approval of the San Joaquin River Agreement and the Vernalis Adaptive Management Plan flows for the April-May pulse flow period do not fully satisfy the flow-dependent objectives of the 1995" Bay-Delta Plan. The judgment ordered the issuance of

a writ of mandate "commanding the . . . Board to commence further proceedings consistent with the STATEMENT OF DECISION. As to all other causes of action, the petition for writ of mandate is DENIED." In its statement of decision, the court explained that the writ of mandate would "remand[ ] this portion of D-1641 to the [Board] for further proceedings [to either] fully assign responsibility for meeting all of the flow-dependent objectives or modify the 1995 Plan objectives."

The trial court did not address the issue of whether Decision 1641 adequately implemented the southern Delta salinity objectives.

Some of the parties to the San Joaquin River Agreement-namely, San Joaquin River Group Authority and its member agencies, San Joaquin River Exchange Contractors Water Authority and its member agencies, Friant Water Users Authority, and the City and County of San Francisco (collectively San Joaquin River Group)-filed a timely notice of appeal from the part of the judgment that granted the Central Delta parties' writ petition. After the Central Delta parties filed a timely notice of appeal from the remainder of the judgment (i.e., from the denial of their mandamus petition on all other grounds), three other parties to the San Joaquin River Agreement-State Water Contractors, Kern County Water Agency, and Metropolitan Water District of Southern California (collectively State Water Contractors)-filed a timely notice of cross-appeal from the part of the judgment that granted the mandamus petition. The Board also filed a timely notice of cross-appeal from that part of the judgment. Thus, one appeal and two cross-appeals challenge the trial court's ruling that the Board's approval of the San Joaquin River Agreement does not fully satisfy the flow-dependent objectives of the 1995 Bay-Delta Plan.

For their part, in their appeal the Central Delta parties argue, among other issues, that the Board failed to implement

the southern Delta salinity objectives from the 1995 Bay-Delta Plan.

i. *The Vernalis Pulse Flow Objective*

We first address the trial court's ruling that the Board failed to implement the Vernalis pulse flow objective. In their challenges to that ruling, San Joaquin River Group, State Water Contractors, and the Board each argue that the 1995 Bay-Delta Plan allowed for staged implementation of the Vernalis pulse flow objective, and the Board's decision to adopt the San Joaquin River Agreement and its alternate flows during an interim, experimental stage was both authorized and reasonable. We disagree.

Because a water quality control plan is quasi-legislative (*State Water Resources Control Bd. v. Office of Admin. Law, supra*, 12 Cal.App.4th at pp. 701-702, 16 Cal.Rptr.2d 25), we construe the requirements of the 1995 Bay-Delta Plan independently of the trial court, with appropriate deference to the Board's interpretation. "'The interpretation of a regulation, like the interpretation of a statute, is, of course, a question of law, and while an administrative agency's interpretation of its own regulation obviously deserves great weight, the ultimate resolution of such legal questions rests with the courts.' (Citations omitted.) [Citation.] However, the court generally will not depart from the agency's interpretation unless it is clearly erroneous or unauthorized." (*Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 986-987, 8 Cal.Rptr.2d 565.)

We begin by addressing the Board's characterization of its action as a "staged implementation" of the Vernalis pulse flow objective. We believe that characterization is inaccurate. In our view, the Board's action was a *delayed* implementation of the objective, accompanied by the immediate implementation of an alternate (albeit temporary) experimental

flow regime which, by the Board's own admission, provided for the possibility of a lesser flow than the Vernal-is pulse flow objective.

Nevertheless, regardless of whether the Board's implementation of the Vernalis pulse flow objective was "staged" or "delayed," the real question is whether anything in the 1995 Bay-Delta Plan authorized the Board to implement a temporary, experimental flow regime that might not provide as much water as the Vernalis pulse flow objective. We find no such provision.

As we have previously explained, a water quality control plan must include water quality objectives and a program of implementation needed for achieving those objectives. (§ 13050, subd.(j).) Moreover, the program of implementation must include "[a] description of the nature of actions which are necessary to achieve the objectives" and "[a] time schedule for the actions to be taken." (§ 13242, subds. (a), (b).)

In Decision 1641, the Board relied on the "time schedule" provision of section 13242 to justify its approval of the San Joaquin River Agreement flow regime as an "interim" requirement. On appeal, the Board likewise argues that "[t]he [Vernalis Adaptive Management Plan] experimental period constitutes a 'time schedule' for meeting the [flow] objectives" in the 1995 Bay-Delta Plan. The first flaw in that argument is that, by law, the time schedule for the actions to be taken to achieve objectives in a water quality control plan must be included *as part of the plan itself.* (§ 13242.) The 1995 Bay-Delta Plan contains nothing about "[t]he [Vernalis Adaptive Management Plan] experimental period." The Board must point to a time schedule *in the 1995 Bay-Delta Plan* that authorized it to postpone implementing the Vernalis pulse flow objective. The Board has failed to identify any such provision.

The second flaw in the Board's argument is that, regardless of the timing issue, the Board has failed to identify anything in the plan that authorized it to implement a flow objective *other* than the Vernalis pulse flow objective, even temporarily. The Vernalis pulse flow objective required a minimum monthly average flow of water at a particular point in the San Joaquin River for a 31-day period in April and May each year, ranging from 3,110 to 8,620 cubic feet per second. Nothing in the 1995 Bay-Delta Plan authorized the Board to implement a different flow regime that could provide less than that amount of water.

This same flaw defeats arguments made by San Joaquin River Group and State Water Contractors. San Joaquin River Group contends that under the 1995 Bay-Delta Plan, because there was no specific schedule for achieving the Vernalis pulse flow objective, the Plan provided that implementation "*should* be immediate." San Joaquin River Group then argues at length about the meaning of the word "should," concluding that because "should" is generally permissive and advisory, the Board had the power *not* to implement the Vernalis pulse flow objective immediately and instead provide for a staged implementation. San Joaquin River Group points to nothing in the plan, however, that authorized the Board to implement a *different* flow objective than the Vernalis pulse flow objective, even on a temporary basis.

For its part, State Water Contractors point to the provision in the 1995 Bay-Delta Plan where the Board recommended that the Department and the Bureau "should conduct experiments to investigate and evaluate the biological benefits of pulse flows to move planktonic fish eggs and larvae into Suisun Bay." According to State Water Contractors, this provision supports a reading of the 1995 Bay-Delta Plan allowing for staged implementation of the Vernalis pulse flow requirement, because "when the Board . . . embraced the Vernalis Adaptive Management Plan . . . it did exactly what it

said it would do in the implementation program of the" 1995 Bay-Delta Plan. Like the Board and San Joaquin River Group, however, State Water Contractors fail to point to anything in the plan that authorized the Board to implement a flow objective different than the Vernalis pulse flow objective. Contrary to State Water Contractors' suggestion, it is far from apparent that the experiments the Board recommended could not be conducted under the flow objectives provided for in the 1995 Bay-Delta Plan. In any event, even if those experiments did require flows that were less than those required by the 1995 Bay-Delta Plan, the 1995 Bay-Delta Plan cannot reasonably be read as authorizing the Board to implement a lesser flow regime during the water rights proceeding that was to follow the plan's adoption.

It is critical to note that the recommended experiments to which State Water Contractors refer were not part of the component of the program of implementation designed to achieve the flow objectives of the 1995 Bay-Delta Plan. Instead, they were part of a different component-recommendations to improve habitat conditions. In introducing those recommendations, the Board explained that "[t]here are numerous actions that can be taken, *in addition to establishing and implementing water quality objectives for the Bay-Delta Estuary*, to improve fish and wildlife beneficial uses in the Estuary." (1995 Bay-Delta Plan, p. 33, italics added.) One such action was the recommended experiments. Thus, the experiments were expressly intended as actions *additional* to those needed to achieve the flow objectives of the 1995 Bay-Delta Plan. The Board's recommendation of these experiments in the plan cannot reasonably be read as allowing the Board to implement in Decision 1641 an experimental flow regime in lieu of the plan's Vernalis pulse flow objective, even temporarily.

We agree with State Water Contractors, in the abstract, that the "careful, sequential implementation of a water quality

objective important to fish and other competing beneficial uses of water is compatible with the requirements of the Porter-Cologne Act." We cannot agree, however, that the 1995 Bay-Delta Plan actually *provided* for a sequential implementation of the Vernalis pulse flow objective, with the first stage to consist of an experimental flow regime that could provide smaller flows. In the plan of implementation in the 1995 Bay-Delta Plan, the Board specified that it would "address the water supply-related objectives in this plan"-including the objectives for "river flow"-in a later "water rights proceeding . . . through the amendment of water rights under the authority of the [Board]." The Board further stated that "[t]he water right decision . . . *will* allocate responsibility for meeting the objectives among water rights holders in the Bay-Delta Estuary watershed." (1995 Bay-Delta Plan, p. 27, italics added.) No provision was made for allocating responsibility to meet any objectives other than those specified in the 1995 Bay-Delta Plan.

Of course, had the proposal for the San Joaquin River Agreement and the Vernalis Adaptive Management Plan been made during the hearings on the 1995 Bay-Delta Plan, the Board might have adopted the temporary, experimental flow regime as a part of the river flow objectives in the 1995 Bay-Delta Plan, based on a determination that the experimental flows would help "ensure the reasonable protection of beneficial uses" by helping the Board determine what flows are most optimal to enhance the survival of fish in the San Joaquin River. (§ 13241.) Or, perhaps, when the proposal for the San Joaquin River Agreement and the Vernalis Adaptive Management Plan was presented to the Board in the water rights proceeding, the Board could have sought to conduct a regulatory proceeding to amend the 1995 Bay-Delta Plan before completing the water rights proceeding. But the Board could not properly adopt the San Joaquin River Agreement's alternate flow regime, even on a temporary basis, in the water rights proceeding under the guise of a "staged imple-

mentation" of the objectives in the 1995 Bay-Delta Plan, because that "staged implementation" fundamentally altered those objectives, and such an alteration could be accomplished only through a properly noticed and conducted regulatory proceeding.[21] (*See* § 13244.)

Contrary to State Water Contractors' assertion, the trial court's decision does not rest on "the assumption that water right decisions adopted by the . . . Board must provide for full and immediate implementation of the water quality objectives set forth in any applicable water quality control plan." The trial court's decision rests on the conclusion (with which we agree) that when a water quality control plan calls for a particular flow objective to be achieved by allocating responsibility to meet that objective in a water rights proceeding, and the plan does *not* provide for any alternate, experimental flow objective to be met on an interim basis, the decision in that water rights proceeding must fully implement the flow objective provided for in the plan. The guiding principle is that the Board's power to act in a water rights proceeding commenced to implement a water quality control plan is constrained by the terms of the plan it is implementing.

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[21] Nothing in *United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d 82, 227 Cal.Rptr. 161, *prohibits* the Board from conducting a regulatory proceeding to amend a water quality control plan in the midst of an adjudicative proceeding to assign responsibility for meeting the water quality objectives in that plan. In that case, the court concluded that "combining the water quality and water rights functions in a single proceeding . . . was unwise," not impermissible. (*Id.* at p. 119, 227 Cal.Rptr. 161.) The reason the combination of functions was unwise was that "the Board compromised its important water quality role by defining its scope too narrowly in terms of enforceable water rights." (*Id.* at p. 120, 227 Cal.Rptr. 161.) As long as the Board avoided any such compromise, we *See* no reason the Board could not have commenced a regulatory proceeding to amend the 1995 Bay-Delta Plan to modify the flow objectives in the plan for the purpose of authorizing the San Joaquin River Agreement and the Vernalis Adaptive Management Plan.

The Board disagrees, contending that "[n]othing in the Porter-Cologne Act mandates the . . . Board to adopt all of the flow-dependent objectives in a water quality control plan when it issues a water right decision." According to the Board, it is required only to "consider" such objectives; it is not required to implement them.

Section 13247—part of the Porter-Cologne Act-provides that "[s]tate offices, departments, and boards, in carrying out activities which may affect water quality, *shall* comply with water quality control plans approved or adopted by the state board unless otherwise directed or authorized by statute . . . ." (Italics added.) Here, in the plan of implementation in the 1995 Bay-Delta Plan, the Board specifically stated that "[t]he water right decision . . . *will* allocate responsibility for meeting the [water supply-related] objectives among water rights holders in the Bay-Delta Estuary watershed." (1995 Bay-Delta Plan, p. 27, italics added.) Thus, the 1995 Bay-Delta Plan specifically identified this water rights proceeding and Decision 1641 as the action "necessary to achieve the [river flow] objectives" of the 1995 Bay-Delta Plan, including the Vernalis pulse flow objective. (§ 13242, subd (a).) Certainly, in conducting a water rights proceeding for the express purpose of allocating responsibility for meeting a water quality objective in a water quality control plan, the Board is "carrying out [an] activit[y] which may affect water quality." (§ 13247) Accordingly, the Board was compelled by section 13247 to comply with the 1995 Bay-Delta Plan unless another statute authorized the Board *not* to comply with the plan.

The Board first challenges the premise that it committed itself in the 1995 Bay-Delta Plan to implementing the flow objectives of the plan. The Board points to language in the last paragraph of the part of the program of implementation that addressed river flows, which stated, "These flows will be considered by the [Board] in its allocation of responsibility

among the water rights holders in the watershed during the water rights proceeding." (1995 Bay-Delta Plan, p. 28.) According to the Board, this language "acknowledges that the . . . Board's implementation responsibility as to the San Joaquin River flows is to 'consider' such objectives in the follow-on water right proceedings."

This argument fails because the Board takes the language on which it relies out of context. The paragraph on which the Board relies expressly addresses the "interim flows" that the Bureau was to provide "[p]rior to adoption of the water rights decision." Thus, the Board was merely stating that it would consider those interim flows when it allocated responsibility for the plan's flow objectives in the water rights proceeding. The Board was *not* stepping back from its commitment to actually allocate responsibility for the flow objectives in that proceeding.

The Board also refers to portions of the EIR that it prepared in connection with the 1995 Bay-Delta Plan and contends that those passages show "the . . . Board expressly envisioned that [it] might reevaluate the San Joaquin River pulse flow requirements in the follow-on water right decision." This argument is meaningless. Whether the Board envisioned a reevaluation of the Vernalis pulse flow objective during the water rights proceeding, we have decided already that the Board had no power to *change* that objective in that proceeding. The question that remains is whether the Board had the statutory authority not to comply with its own water quality control plan, in which it committed itself to implement a flow objective by allocating the responsibility for meeting that objective among the appropriate water right holders in a water rights proceeding. The Board has failed to identify any such authority.

To provide such authority, the Board relies on sections 1257 and 1258, which specify what factors the Board must consider "[i]n acting upon applications to appropriate water."

(§ 1257.) Section 1257 requires the Board to "consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to . . . any uses specified to be protected in any relevant water quality control plan . . . ." More directly, section 1258 provides that the Board "shall consider water quality control plans which have been established pursuant to Division 7 (commencing with Section 13000) of this code, and *may* subject such appropriations to such terms and conditions as it finds are necessary to carry out such plans." (Italics added.) According to the Board, these provisions "expressly grant the . . . Board the discretionary authority to apply the quasi-legislative requirements of the water quality control plans when adopting quasi-judicial water right decisions such as D-1641."

Even assuming for the sake of argument that in conducting the water rights proceeding at issue here the Board was "acting upon applications to appropriate water,"[22] we conclude the Board's reliance on sections 1257 and 1258 is misplaced. In effect, the Board's position is that the word "may" in section 1258 gives it the discretion to decide whether "to implement all aspects of a water quality control plan," even if (as here) the plan itself evidences a commitment by the Board to do so. This position is based on the unspoken premise that "may," in this context, denotes the right, but not the obligation, to act.

This premise is contrary to well-established precedent. As our Supreme Court explained in *Mass v. Board of Education* (1964) 61 Cal.2d 612, 39 Cal.Rptr. 739, 394 P.2d 579, in response to another public entity's attempt to avoid a statutory obligation, "Although the word 'may' customarily implies permissiveness [citation], words must be construed in their

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[22] In our view, the Board was not acting on applications to appropriate water, so much as it was acting on *permits* that already allowed the appropriation of water.

textual context. [Citation.] The word 'may' here occurs in a statute defining a public duty. '"Words permissive in form, when a public duty is involved, are considered mandatory.'" (*Id.* at pp. 616, 622-623, 39 Cal.Rptr. 739, 394 P.2d 579, quoting *Harless v. Carter* (1954) 42 Cal.2d 352, 356, 267 P.2d 4.) " '[W]here the purpose of the law is to cloth public officers with power to be exercised for the benefit of third persons, or for the public at large-that is, where the public interest or private right requires that a thing should be done—then the language, though permissive in form, is peremptory.'" (*Harless v. Carter, supra*, 42 Cal.2d at p. 357, 267 P.2d 4, quoting *County of Los Angeles v. State* (1923) 64 Cal.App. 290, 295, 222 P. 153.)

Here, the power to be exercised-the power to subject appropriative water rights to terms and conditions necessary to carry out water quality control plans-is undoubtedly a power to be exercised for the public at large. Thus, the word "may" in section 1258 is mandatory, not permissive, and that statute did not exempt the Board from the obligation imposed by section 13247 to comply with its own water quality control plan.

It has been noted that "the principal enforcement mechanism available to the Board [to enforce compliance with water quality control plans] is its regulation of water rights." (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App .3d at p. 125, 227 Cal.Rp tr. 161, italics omitted.) It would be strange if the Board, having determined in a water quality control plan that a water rights proceeding was necessary to achieve the water quality objectives in that plan, could simply decide *not* to take action in that proceeding and thereby refuse to enforce its own plan. Fortunately, the Legislature has not authorized the Board to do any such thing. Thus, the Board cannot-as it attempted to do here—make a de facto amendment to a water quality objective in a water quality control plan by simply refusing to take the

action that it has identified as necessary to achieve that objective.

The Board contends the decision in *United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at pages 143-144, 227 Cal.Rptr. 161, "has affirmed the . . . Board's water right discretion regarding plan objectives." In the combined regulatory/adjudicatory proceeding underlying that decision, the Board generally employed "a so-called 'without project' level of protection" in adopting revised water quality objectives for the Delta. (*Id.* at p. 115, 227 Cal.Rptr. 161.) The Board did not employ that level of protection in all of its water quality objectives, however. For example, "the Board determined that to maintain 'without project' standards of water quality at Antioch to protect the rights of the Antioch riparians [who used the water for an industrial use that was sensitive to salt] would require a wasteful release of 25 acre-feet of outflow for each acre-foot diverted." (*Id.* at p. 143, 227 Cal.Rptr. 161.) Rather than require such an unreasonable waste of water, "the Board eliminated the Antioch standard from the Plan," "accepted the offer of [the Department] to provide a substitute supply to the Antioch riparians through the Contra Costa Canal," "and required the projects only to meet the standards for the canal." (*Id.* at pp. 143-144, 227 Cal.Rptr. 161.) On appeal, the court concluded, "the Board had little choice but to exempt the projects from the Antioch standards" "[i]n light of the constitutional mandate proscribing unreasonable or wasteful use of water (Cal Const , art X, § 2)." (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 144, 227 Cal.Rptr. 161.)

The Board interprets this part of the court's decision as "affirm[ing] the . . . Board's deviation from the 'without project' standard" based on "the [constitutional] prohibition against waste and unreasonable use." Thus, according to the Board, the decision in *United States v. State Water Resources*

Control Bd. affirms the Board's power to disregard objectives in a water quality control plan.

The Board has misread the case on which it relies. The fact that the proceeding underlying that case encompassed both the regulatory proceeding to amend the water quality control plan for the Delta, and the adjudicatory proceeding to implement that plan by modifying existing water rights, may have led to the Board's confusion. Although the court did, at one point, characterize the Board's action as "declining to impose the Antioch standards upon the projects" and "exempt[ing] the projects from the Antioch standards," at an earlier point the court made it clear that what the Board did was "eliminate . . . the Antioch standard from the Plan." (*United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 144, 227 Cal.Rptr. 161.) In other words, the Board did not deviate from an established water quality objective in the water rights proceeding brought to achieve that objective. Instead, in the exercise of its regulatory powers, the Board decided not to include a water quality objective in the plan in the first place because achieving that objective would have required the projects to release an unreasonable amount of water to maintain the salinity level the Antioch riparians required for their industrial activities.

Even if *United States v. State Water Resources Control Bd.* could be read to sanction deviations from a water quality control plan to prevent the unreasonable or wasteful use of water, the Board does not argue that such a deviation was proper here. The deviation from the plan at issue here was the Board's substitution of the San Joaquin River Agreement flow regime for the Vernalis pulse flow objective. The Board cannot seriously argue that compliance with the Vernalis pulse flow objective would have resulted in the unreasonable or wasteful use of water, especially given the fact that that objective is to take effect when the San Joaquin River Agreement expires or is terminated by the parties. Thus,

United States v. State Water Resources Control Bd., supra, 182 Cal.App.3d 82, 227 Cal.Rptr. 161, provides no support for the Board's argument.

In conclusion, we agree with the trial court that by adopting the San Joaquin River Agreement flow regime in lieu of the Vernalis pulse flow objective in Decision 1641, even on a temporary basis, the Board failed to fully implement the 1995 Bay-Delta Plan and instead accomplished a de facto amendment of that plan without complying with the procedural requirements for amending a water quality control plan. In so acting, the Board failed to proceed in the manner required by law and thus abused its discretion. Accordingly, the trial court properly granted the mandamus petition of the Central Delta parties to the extent they challenged this aspect of Decision 1641, and we will affirm that portion of the judgment in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).

ii. *The Southern Delta Salinity Objectives*

The Central Delta parties contend the Board "did not in fact implement a plan to achieve" the salinity objectives for salinity in the southern Delta because "[a]lthough the Board assigned the responsibility for meeting the salinity standards to the Bureau and [the Department], the evidence as well as the statements of the Board clearly show that the Bureau . . . does not plan to implement any actions which will improve its ability to meet the salinity standards." In their reply brief, the Central Delta parties emphasize the effect of the change the Board made to the footnote in the 1995 Bay-Delta Plan with respect to the southern Delta salinity objectives, noting that this change results in delayed implementation of the salinity objectives at the three locations downstream of Vernalis.

We find no merit in the broader argument of the Central Delta parties that the Board failed to implement the southern Delta salinity objectives by assigning responsibility for meeting them to the Department and the Bureau. Contrary to the suggestion of the Central Delta parties, the Board was not required to tell the Bureau and the Department exactly *how* they were to meet the salinity objectives. For our purposes, it is enough that Decision 1641 directed the Bureau and the Department *to* meet those objectives, and the Central Delta parties have not shown the Bureau and the Department *cannot* meet those objectives. Obviously, if such a showing were made, then the Decision 1641's allocation of responsibility to the Bureau and the Department would have been illusory and would not have complied with the Board's obligation to implement its own water quality control plan. In the absence of such a showing, however, we cannot conclude the Board failed to implement the 1995 Bay-Delta Plan by directing the Bureau and the Department to meet the salinity objectives in that 1995 Bay-Delta Plan.

We do find merit, however, in the narrower argument that the Board failed to adequately implement the southern Delta salinity objectives at the three locations downstream of Vernalis by delaying implementation of the 0.7 EC objective at those locations. The 1995 Bay-Delta Plan specified that implementation of the 0.7 EC objective at the two locations on Old River would be phased in so that full compliance would be achieved by the end of 1997. No delayed implementation was provided for the San Joaquin River at the Brandt Bridge site. In this water rights proceeding, however, the Board extended the delayed implementation at the Old River sites by more than seven years, to April 1, 2005, and authorized this same delayed implementation for the Brandt Bridge site. Furthermore, Decision 1641 specified that the 0.7 EC objective would be "replaced" by the 1.0 EC objective after April 1, 2005, "if permanent barriers are constructed, or equivalent measures are implemented, in the southern Delta

and an operations plan that reasonably protects southern Delta agriculture is prepared by the [Department] and the [Bureau] and approved by the Executive Director of the [Board]."

There is nothing in the 1995 Bay-Delta Plan that allowed the Board to further delay implementation of the 0.7 EC objective at the two Old River sites, or that allowed the Board to delay implementation of that objective at the Brandt Bridge site, or that allowed the Board to replace that objective with a different objective under any circumstances. In taking these actions, the Board failed to adequately implement the 1995 Bay-Delta Plan and instead effectively amended the 1995 Bay-Delta Plan without complying with the procedural requirements for amending a water quality control plan.

Since the extended implementation date of April 1, 2005, has already passed, the Board's delay in implementing the 0.7 EC objective until that date is a moot issue. However, the provision in Decision 1641 that replaces the 0.7 EC objective with the 1.0 EC objective under certain conditions *after* April 1, 2005, is not moot. As with the Vernalis pulse flow objective, the Board must either fully implement the southern Delta salinity objectives as set forth in the 1995 Bay-Delta Plan or must duly amend the plan. Accordingly, we will direct the trial court to modify its judgment in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502) to accomplish this result.

b. *Approving The Petitions For Long-Term Changes*

As previously noted, to allow for performance of the San Joaquin River Agreement, the Board, in Decision 1641, approved petitions by the irrigation districts to add the San Joaquin River upstream of Vernalis as a place of use and add fish and wildlife enhancement as a purpose of use in their licenses. These long-term changes, which were to last during the period of the San Joaquin River Agreement, would allow

the irrigation districts to contribute up to 110,000 acre-feet of water per year for instream flows in the lower San Joaquin River above Vernalis to assist the Bureau in meeting the April-May pulse flow objectives in the San Joaquin River Agreement.

i. *The "No Injury" Rule*

The Board's approval of the petitions was governed by sections 1707 and 1736. Sections 1735 and 1736 authorize the Board to approve "a petition for a long-term transfer of water or water rights involving a change of point of diversion, place of use, or purpose of use" "where the change would not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other in-stream beneficial uses." A long-term transfer is one "for any period in excess of one year." (§ 1735.)

Subdivision (a)(1) of section 1707 provides that "[a]ny person entitled to the use of water, whether based upon an appropriative, riparian, or other right, may petition the board . . . for a change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water." Subdivision (b) of the statute authorizes the Board to approve such a petition if the Board determines that the proposed change "[w]ill not increase the amount of water the person is entitled to use," "[w]ill not unreasonably affect any legal user of water," and "[o]therwise meets the requirements of this division."

In addressing the petitions of the irrigation districts, the Board noted that "[i]n general, the [irrigation districts] will not decrease consumptive use in their districts. Rather, the water provided under the proposed changes will come from conservation efforts, substitute groundwater pumping, stored water or reservoir reoperation." (Decision 1641, p. 28.)

As the Board observed, the Central Delta parties "argued that the proposed changes would injure other legal users of

water because the changes would result in poorer water quality at Vernalis during the summer irrigation season. Because the water to be supplied under the petitioned changes will not be from a reduction in consumptive use, they attempted to show that there would be adverse effects on downstream water right holders as a result of reduction or elimination of return flows, decreased groundwater accretions in the tributaries, and storage reductions in New Mel-ones Reservoir (leading to a decreased supply of water to meet the Vernalis salinity objective)."

In addressing these arguments, the Board first observed that downstream riparian users "cannot . . . require that water stored [upstream] in another season be released for their benefit" and therefore they could not be injured by any change in the use of stored water by the irrigation districts. Because riparian users might be injured by changes in the use of natural flow, however, the Board determined the "fundamental issue" was "whether there is sufficient natural flow to satisfy the diversion requirements of riparian right holders in the southern Delta." The Board concluded that, on average, natural flow is insufficient to meet agricultural demands in the southern Delta in August, September, and October of most years. Accordingly, any further reductions in summer flows due to the long-term changes in the licenses of the irrigation districts would not injure Delta riparians.

With respect to appropriative users in the Delta, the Board observed that, like riparian users, they "cannot require that the owner of an upstream reservoir release water appropriated during another season." As for natural flow, the Board stated that "[i]f the [San Joaquin River Agreement] water suppliers make water available under the petitioned changes by causing a reduction in return flows from direct diversions of water, and conserved water is held in storage in New Melones Reservoir, downstream appropriators could be injured" "if inadequate water reaches the downstream right holders during

the time period when natural flows occur." The Board noted that while Oakdale and South San Joaquin Irrigation Districts might use direct diversion rights between May 1 and October 1 to provide water under the San Joaquin River Agreement, "[a]ny legal injury [from such use] will depend on relative seniority of the water rights involved and the presence of natural flow. It is unlikely, however, that either defacto [*sic*] or legal injury will occur, since the water provided for instream flows will be available to water right holders in the Delta after it passes Vernalis." (Decision 1641, pp. 33, 34.)

Ultimately, the Board found that "the changes, as conditioned, will not unreasonably affect or substantially injure any legal user of water." (Decision 1641, p. 49.)

In the second cause of action in their non-CEQA writ petition, the Central Delta parties alleged the Board's "no injury" findings were "not supported by the evidence and . . . contrary to law" because the long-term changes would "allow for shifting of river flows from late spring and summer to the period from approximately April 15 to May 15" and "[s]uch shift in flows degrades the quality of water for irrigation in downstream areas."

The trial court rejected this claim, concluding that "the [San Joaquin River Agreement], in conjunction with other D-1641 measures, actually improves water quality."

On appeal, the Central Delta parties renew their challenges to the Board's approval of the long-term changes to the irrigation districts' licenses to allow for performance of the San Joaquin River Agreement. They first contest the Board's determination that downstream riparian users cannot be injured by a change in the use of water stored upstream. According to them, the Board erred in determining that the changes "would not result in substantial injury to any legal user of water" under section 1736 and would "not unreasonably affect any legal user of water" under subdivision (b)(2) of section 1707 because the Board "substitute[d]

the question of water rights for the question of injury to legal users."

In *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450, 173 P. 994, our Supreme Court explained that a downstream riparian user may not claim any benefit from the storage of water by an upstream appropriator. "[The riparian user] is not in a position to demand that the [upstream appropriator] shall, by its artificial works, furnish a constant flow of water in [the watercourse] throughout the year. His only rights are those which he would have had under the natural conditions existing before the dam was erected, subject to the deduction of so much of the water as [the upstream appropriator] has continuously applied to a beneficial use. In other words, he cannot require the [upstream appropriator] to discharge any water into the stream during those months in which there would be no flow if no dam had ever been built. He may merely insist that, during the months of natural flow, the [upstream appropriator] shall permit the escape into the [watercourse] of the surplus of the natural flow over and above what is required to enable the [upstream appropriator] to meet its reasonable needs . . . ." (*Id.* at p. 457, 173 P. 994.)

According to the Central Delta parties, the foregoing rule has no application here because whether downstream riparian users have any legal "right" to water stored by others upstream, they may still claim "injury" from changes in the use of that water under sections 1707 and 1736. We disagree.

Sections 1707 and 1736 are two of many sections in the Water Code that codify what we will refer to as the "no injury" rule. (*See* §§ 1702, 1706, 1707, 1725, 1736.)[23] The Central

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[23] Although the wording of these statutes is not identical, all but one (§ 1707) incorporate the concept of "injury." Although section 1707 prohibits a change that will "unreasonably affect" a legal user of water, rather than a change that will "injure" such a user, the Central Delta parties urge us to construe all of the statutes consistently. We see no reason not to do so.

Delta parties contend that the concept of "injury" has nothing to do with the legal right to use water. According to them, in these statutes "the Legislature directs the Board to look into how the consequences of changes to permit conditions might affect others, *not* whether others have water rights to the water which is affected by the requested permit changes." But "injury" can mean "[t]he invasion of a[ ] legally protected interest" (Black's Law Dict. (5th ed.1979) p. 706, col. 2), and this meaning would require a determination of the extent of a downstream riparian's "legally protected interest" in the water that is the subject of the change petition to determine if that interest will be invaded by the change.

Since the word "injury" is ambiguous (i.e., susceptible of more than one reasonable interpretation) in the context of these Water Code sections, "'we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history'" in construing these statutes. (*Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227, 120 Cal.Rptr.2d 795, 47 P.3d 639.) Ultimately, we must "choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute[s]." (*Ibid.*)

To understand the intended meaning of the "no injury" rule, we must go back to the common law rules that governed water rights in the early days of statehood, before any legislation on the subject. Specifically, we begin by looking at the principles that governed changes to an established appropriation of water at common law.

An early, albeit brief, discussion of the subject appears in *Maeris v. Bicknell* (1857) 7 Cal. 262, 1857 WL 703. One question in that case was "whether a party who makes a prior appropriation of water can change the place of its use, without losing that priority as against those whose rights have attached before the change." (*Id.* at p. 264.) The Supreme Court responded to that question simply, stating: "This ques-

tion, we think, can admit of but one answer. It would seem clear that a mere change in the use of water, from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party. It would destroy the utility of such works were any other rule adopted. As to the question whether a party can change the use of the water from one purpose to another, without affecting his prior right, we express no opinion, as the point does not arise in this case." (*Ibid.*)

If the decision in *Maeris* suggested that a prior appropriator could, *without restriction,* change the place where he uses the water he appropriates, that suggestion was repudiated in *Kidd v. Laird* (1860) 15 Cal. 162, 1860 WL 1069, where the Supreme Court drew on existing common law authority to address the question of changes to an established appropriation. *Kidd* involved "an action to recover damages for the diversion of water from Deer Creek, in Nevada county," which was premised on the defendants' construction of a new diversion ditch upstream from the plaintiffs' established ditches. (The defendants had previously been diverting water through a ditch that was downstream from the plaintiffs' ditches.) (*Id.* at pp. 177-178.) On appellate review, the case turned on the correctness of a jury instruction "that a person entitled to divert a given quantity of the water of a stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, if the rights of others are not injuriously affected by the change." (*Id.* at pp. 167, 179.) In concluding the instruction was proper, the Supreme Court wrote: "'In this country, the doctrine is well settled' . . . 'that where a right has been acquired by virtue of twenty years' enjoyment to use a certain quantity of water, a change in the mode and objects of use is justifiable; and here, as in England, the only restriction is, that the alterations made from time to time shall not be injurious to those whose interests are involved.' [Citation.] 'All that the law requires

is, that the mode or manner of using the water should not have been materially varied, to the prejudice of others.' [Citation.] The case of *Whittier v. Cocheco Manuf. Co.*, 9 N.H. 454, is directly in point. It was there decided that a change may be made in the place, as well as in the mode and objects of the use, if the quantity of water used is not increased, and the change is not to the prejudice of others. It was held that a party who had acquired by prescription a right to take a certain quantity of water at a particular dam, might open his gates and draw that quantity, without using it there, in order to use it at other works below on the same stream. These authorities show conclusively, that in all cases the effect of the change upon the rights of others is the controlling consideration, and that in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper." (*Id.* at pp. 180-181.)

What is most significant about *Kidd* is its statement that "in all cases the effect of the change upon the *rights* of others is the controlling consideration." (*Kidd v. Laird, supra,* 15 Cal. at p. 181, italics added.) Under *Kidd*'s articulation of the "no injury" rule, only those "others" who had "rights" to the water involved could claim "injury," and they could show "injury" only by showing an injurious effect on their "rights" to the water involved in the change.

This formulation of the "no injury" rule also appears in other California cases predating any water rights legislation. For example, in *Hill v. Smith* (1865) 27 Cal. 476, 1865 WL 424, the court stated that neither an appropriator nor a riparian user "can so use the water as to injure or prejudice the prior *rights* to a like use by the other." (*Id.* at p. 482, italics added.)

In 1872, the Legislature codified (as former Civil Code sections 1410-1422) some of the common law principles governing the appropriation of water, including the "no injury" rule. (Stats. 1871-1872, ch. 424, § 1, p. 622; *Lux v. Haggin*

(1886) 69 Cal. 2[illegible] 374-375, 10 P. 674; Hutchins, The California Law of Water Rights (1956) pp. 49-50, 89-92.) Former Civil Code section 1410 provided that "'[t]he right to the use of running water flowing in a river or stream, or down a cañon or ravine, may be acquired by appropriation.'" (*Lux v. Haggin, supra*, 69 Cal. at p. 368, 10 P. 674.) Former Civil Code section 1411 provided that "'[t]he appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.'" (*Lux*, at p. 369, 10 P. 674.) And, as most pertinent here, former Civil Code section 1412 provided that " '[t]he person entitled to the use may change the place of diversion if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.'" (*Lux*, at p. 369, 10 P. 674.)

Although former Civil Code section 1412 applied the "no injury" rule only to changes in the place of diversion, the California Supreme Court continued to apply that rule more broadly, as in *Ramelli v. Irish* (1892) 96 Cal. 214, 31 P. 41. There, citing both former Civil Code section 1412 and *Kidd v. Laird, supra*, 15 Cal. 162, the court stated: "It is . . . settled law that the person entitled to the use of water may change the place of diversion, or the place where it is used, or the use to which it was first applied, if others are not injured by such change." (*Ramelli v. Irish, supra*, 96 Cal. at p. 217, 31 P. 41.)

Moreover, even though former Civil Code section 1412 and *Ramelli* did not expressly refer to injury to the *rights* of others, it is apparent that the "no injury" rule continued to apply as first stated in *Kidd*—that is, that the "injury" in question was an adverse effect on the *rights* of others to the water involved. Thus, for example, in *Hargrave v. Cook* (1895) 108 Cal. 72, 41 P. 18, the court noted that a prior appropriator had "the right to change the place and purpose of use so long as the change did not injuriously affect the *rights* of the

subsequent appropriators and claimants." (*Id.* at p. 80, 41 P. 18, italics added.)

In 1911, the Conservation Commission of California was created with the specific charge of "'prepar[ing] and recommend[ing] to the Legislature laws, statutes, and constitutional amendments revising, systematizing, and reforming the laws of this State upon . . . water, [and] the use of water . . . .'" (Chandler, *The "Water Bill" Proposed by the Conservation Commission of California* (1912-1913) 1 Cal. L.Rev. 148, 148, quoting Stats.1911, p. 822.) One of the results of that effort was the Water Commission Act, which went into effect in 1914.[24] "The main purpose of the Water Commission Act was to provide an orderly method for the appropriation of unappropriated waters," and "[i]t supplanted the alternative nonstatutory and Civil Code procedures" for appropriating water. (Hutchins, The California Law of Water Rights, *supra,* p. 95.)

For the first time, the Water Commission Act gave control over appropriations of water to an administrative agency and required a person *See*king to appropriate water to submit an application to the agency identifying, among other things, "the nature and the amount of the proposed use" and "the proposed place of diversion and the place where it is intended to use the water." (Stats. 1913, ch. 586, § 16, p. 1021.) Sections 16 and 39 of the Water Commission Act imported the "no injury" rule into the administrative setting. Section 16 provided that once an application was filed, any change in the point of diversion could be made only with the permission of the commission, which could be granted only on a finding "that such change in the place of diversion will not operate to

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[24] "The Water Commission Act was enacted in 1913 and, after being withheld by referendum, it was approved by vote of the people and went into effect December 19, 1914." (Hutchins, The California Law of Water Rights, *supra,* p. 94.)

the injury of any other appropriator or legal user of such waters." (Stats. 1913, ch. 586, § 16, p. 1022.) Section 39 of the Water Commission Act provided that "water appropriated for one purpose under the provisions of this act may be subsequently appropriated for other purposes under the provisions of this act; *provided,* that such subsequent appropriation shall not injure any previous appropriation." (Stats. 1913, ch. 586, § 39, p. 1032.)

As originally enacted, the Water Commission Act provided for inconsistent application of the "no injury" rule. Unlike section 16, which applied to changes in the place of diversion, section 39 of the Water Commission Act, which governed changes in the purpose of use of appropriated water, did not employ the term "legal user." (Stats.1913, ch. 586, § 39, p. 1032.) Instead, section 39 limited the application of the "no injury" rule in that context to injuries to "any previous appropriation." And the Water Commission Act made no provision whatsoever for changes in the place of use.

The Legislature corrected these inconsistencies by twice amending the "no injury" provisions in the Water Commission Act between 1914 and 1943. In 1921, the Legislature amended section 16 to treat changes in the place of use the same as changes in the place of diversion-that is, making them subject to the commission's approval based on a finding of no injury to "any other appropriator or legal user of such waters." (Stats.1921, ch. 329, § 2, pp. 443-444.) In 1925, the Legislature amended section 39 to make changes in purpose of use subject to the same provisions that governed changes in points of diversion and places of use. (Stats.1925, ch. 339, § 7, p. 595.) At the same time, apparently recognizing that the phrase "legal user" was broad enough to encompass another appropriator, the Legislature amended section 16 to delete the phrase "other appropriator," leaving the phrase "legal user" as the sole operative phrase in the statute. (Stats.1925, ch. 339, § 2, p. 591.) Thus, by 1925, changes in the place of diversion,

place of use, and purpose of use were all subject to approval by the Water Commission on a finding that the change would not operate to the injury of any legal user.

This was the state of the law when the Water Code was enacted in 1943, and section 1702 of that code was drawn from the then current version of section 16 of the Water Commission Act. (Stats.1943, ch. 368, § 16, p. 1628.) In enacting the Water Code, the Legislature specified that "[t]he provisions of this code, in so far as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations thereof, and not as new enactments." (*Id.*, p. 1604.) Thus, section 1702 of the Water Code carried the same meaning that section 16 of the Water Commission Act carried before it.

The Central Delta parties have not pointed us to anything to suggest that later manifestations of the "no injury" rule-including sections 1707 and 1736[25]—were intended to have a different meaning than the original common law rule that became part of the Water Commission Act and then the Water Code. Thus, in determining whether the petitioned changes to the licenses of the irrigation districts would cause "substantial injury" to or would "unreasonably affect" riparian and appropriative users in the Delta, the Board properly focused on the effect of those changes on the *rights* of those users. Since Delta riparians and appropriators have no right to water stored by the irrigation districts, the Board properly concluded they cannot be injured or unreasonably

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[25] Section 1707 was enacted in 1991 (Stats.1991, ch. 663, § 2, pp. 3043-3044); section 1736 was enacted in 1988 (Stats.1988, ch. 1145, § 3, p. 3678), and was derived from former section 1738, which was enacted in 1980 (Stats.1980, ch. 933, § 12, pp. 2957-2958).

affected within the meaning of sections 1707 and 1736 by changes in the use of that water.[26]

As we have noted, the Board observed that downstream appropriators could be injured if Oakdale and South San Joaquin Irrigation Districts varied their direct diversion of water between May 1 and October 1 in such a manner as to cause a reduction in return flows during that period. The Board first stated it was "unlikely . . . that either defacto [*sic*] or legal injury will occur, since the water provided for in-stream flows will be available to water right holders in the Delta after it passes Vernalis." Ultimately, however, the Board found that "the changes, as conditioned, will not unreasonably affect or substantially injure any legal user of water." (Decision 1641, pp. 34, 49.)

Given the Board's ultimate finding, the Central Delta parties' argument that the Board did not make the required findings under sections 1707 and 1736 and instead deferred making those findings is without merit. The only question is whether the Board's findings are supported by substantial evidence. The Central Delta parties contend they are not; we conclude otherwise.

The Board contends the Central Delta parties' "arguments regarding the water quality impacts of the San Joaquin River Agreement are . . . beside the point" because the Board "has expressly directed [the Bureau] to meet the Vernalis salinity objective." In other words, according to the Board, any alterations to the operations of the irrigation districts under the long-term changes to their licenses cannot injure agri-

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[26] To the extent the Central Delta parties contend Delta riparians and appropriators have a right to water stored upstream by others based on the physical solution doctrine, we address that argument separately below. To the extent the Central Delta parties offer the same contention based on the Delta Protection Act (§ 12200 et seq.), we address that argument below in connection with arguments made by other parties based on that act.

cultural users in the southern Delta by degrading water quality in the Delta during the summer because the Bureau is obligated to meet the salinity objective at Vernalis in any event, thereby negating any effects of the changes upstream.

This argument has merit, and the Central Delta parties have no answer for it. The southern Delta agricultural salinity objectives in the 1995 Bay-Delta Plan, including the Vernalis salinity objective, were formulated specifically to maintain an adequate level of protection for agriculture in the southern Delta. The Central Delta parties have not shown that southern Delta water users have any right to water with less salinity than they will receive if those objectives are met. Thus, if the Bureau ensures the salinity objective is met at Vernalis, southern Delta agriculture will be protected against any adverse effects on salinity upstream of Vernalis caused by the long-term changes in the licenses of the irrigation districts.

To the extent the Central Delta parties complain the Bureau will not comply with its obligations to meet the Vernalis salinity objective, this complaint does not provide a basis for challenging the Board's decision to approve the long-term changes to the irrigation districts' licenses. The Board was entitled to approve the requested changes as long as it found "the change would not result in substantial injury to any legal user of water" and "[w]ill not unreasonably affect any legal user of water." (§§ 1707, subd. (b)(2), 1736.) Decision 1641 essentially determined that any injury to the agricultural users in the southern Delta from the requested changes would be avoided if the Bureau meets the agricultural salinity objective at Vernalis during the period of the change—that is, while the San Joaquin River Agreement is in effect. Thus, the Board approved the requested changes subject to the requirement that the Bureau meet that objective.

The Central Delta parties have not shown that the Bureau cannot meet that objective. They contend the Bureau "expects to not meet the [Vernalis salinity] objective . . . because of

how it allocates its limited supply for water quality purposes." The document they cite, however, does not support their assertion. That document-an exhibit submitted by the Bureau-refers to a study of compliance with the Vernalis salinity objective under the San Joaquin River Agreement. According to that document, for a study period of 71 years, the Vernalis salinity objective would be exceeded under the San Joaquin River Agreement in 8 percent of the months.

Whatever the Bureau may have postulated would occur under the San Joaquin River Agreement, Decision 1641 *requires* the Bureau to meet the Vernalis salinity objective through whatever means necessary. We must presume the Bureau will comply with the legal obligation the Board has placed on it and that the Board will enforce that obligation. Since the Central Delta parties have not shown the Bureau cannot meet the Vernalis salinity objective, all they have is their fear the Bureau will not do so. Their fear, however, is not sufficient to show injury to a legal user of water and therefore not sufficient to challenge the Board's decision to approve the long-term changes to the irrigation districts' licenses. Accordingly, the trial court properly rejected the second cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).

ii. *The Physical Solution Doctrine*

In the tenth cause of action in their non-CEQA writ petition, the Central Delta parties alleged the Board erred when it concluded that "riparian right holders cannot require that water stored in another season be released for their benefit" because the Board's decision "ignores the physical solution adjustments to natural flow inherent in water development and use which offset injury to downstream riparians while at the same time fostering maximum beneficial use of the water." The trial court implicitly rejected these allegations.

On appeal, the Central Delta parties reassert this argument. In essence, their claim appears to be that riparian users can be injured by changes in the use of water stored upstream by another because a riparian has a right to that stored water under the physical solution doctrine.

Under the physical solution doctrine, a court adjudicating a water rights dispute may, "within limits," exercise its equitable powers to "impose a physical solution to achieve a practical allocation of water to competing interests." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1249-1250, 99 Cal.Rptr.2d 294, 5 P.3d 853.) Whether, and under what circumstances, such a physical solution could include requiring an upstream appropriator to release stored water for the benefit of a downstream riparian is a question we need not answer here. For our purposes, it is sufficient to note that in the absence of a court order actually *imposing* such a physical solution, a riparian user cannot claim any right under the physical solution doctrine to water stored upstream by another. The Central Delta parties have not identified any such court order here.

Furthermore, as we have concluded already, with the Bureau ordered to meet the Vernalis salinity objective through whatever means necessary, riparians and appropriators in the southern Delta are protected against any adverse effects on salinity caused by the long-term changes in the licenses of the irrigation districts.

For the foregoing reasons, the trial court properly rejected the tenth cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).

iii. *Section 12230 et seq.*

Section 12230 is a statement of findings and a declaration by the Legislature that "a serious problem of water quality exists in the San Joaquin River between the junction of the

San Joaquin River and the Merced River and the junction of the San Joaquin River with Middle River; that by virtue of the nature and causes of the problem and its effect upon water supplies in the Sacramento-San Joaquin Delta, it is a matter of statewide interest and is the responsibility of the State to determine an equitable and feasible solution to this problem."

Section 12231 declares it "to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the San Joaquin River and its tributaries to which the users along the portion of the San Joaquin River described in Section 12230 are entitled."

Section 12232 directs that the Board and other state agencies "shall do nothing, in connection with their responsibilities, to cause further significant degradation of the quality of water in that portion of the San Joaquin River between the points specified in Section 12230."

Finally, section 12233 provides in relevant part that "[n]othing in this part shall be construed . . . as affecting any vested right to the use of water, regardless of origin, or any water project for which an application to appropriate water was filed with the State Water Resources Control Board prior to June 17, 1961."

In its order on reconsideration, the Board addressed an argument by San Joaquin County that the Board's Decision 1641 violated section 12230 et seq. "by making changes in water right permits that affect the reach of the San Joaquin River between its junctions with the Merced River and Middle River." Conceding that all of the relevant water right applications (including those of the irrigation districts) were filed before the date specified in section 12233, the county argued that "if the [Board] subsequently authorizes a change in the permits, [section 12230 et seq. are] applicable to the change." The Board's order on reconsideration rejected this

argument, stating: "Section 12233 refers to the date of *application* for a water right, not to the permit date, which necessarily must be subsequent to the application. As a result, the permits issued after June 17, 1961 on applications filed before June 17, 1961 were not affected . . . . It follows that if the original permits could be issued . . . after June 17, 1961 without being constrained under [section 12230 et seq.], changes in those permits also should not be affected . . . ." (Fn.omitted.)

In the fifth cause of action in their non-CEQA writ petition, the Central Delta parties took up the argument formerly made by San Joaquin County that Decision 1641 violated section 12230 et seq. The trial court rejected this argument in part for the same reason the Board did-because "there is no legal right under th[ese] statute[s] to modify pre-1961 water rights."

On appeal, the issue is joined over whether the limitation in section 12233 applies when the Board authorizes a change to a permit or license based on an application to appropriate water filed before June 17, 1961. The Central Delta parties argue that "[t]he better interpretation of these sections is that new places of use and purposes of use do not constitute a 'vested right to the use of water' for any application to appropriate water that was filed prior to June 17, 1961." They contend, "[t]he resolution of this issue turns on the definition of 'vested water rights.' "Citing the dictionary definition of "vested," they argue that while the irrigation districts may have had vested rights "to divert or store water from the tributaries of the San Joaquin River, at certain places, at certain times, for certain purposes, and in certain amounts as specified in their permits and licenses," "[w]hat was *not* vested were *changes* to the licenses as requested through the D-1641 hearings."

The Central Delta parties have misread section 12233. That statute provides that section 12230 et seq. is to have no effect on "any vested right to the use of water, regardless of [the

source of] origin" of that vested right, *or* on "any water project for which an application to appropriate water was filed with the State Water Resources Control Board prior to June 17, 1961." Thus, any right to use water that was vested when section 12230 et seq. went into effect in 1961 (*See* Stats.1961, ch. 1454, § 1, p. 3300) was immune from those statutes, and so are any water projects for which applications to appropriate water were filed before June 17, 1961.

The licenses of the irrigation districts that were the subject of the long-term change petitions here were all issued on applications to appropriate water that were filed between 1920 and 1954. Thus, those licenses pertained to "water project[s] for which . . . application[s] to appropriate water w [ere] filed . . . prior to June 17, 1961." (§ 12233.) By virtue of the limitation in section 12233, section 12230 et seq. has no effect on those projects.

There is no basis for concluding that a water project which is protected from the effects of section 12230 et seq. because an application to appropriate water for that project was filed before June 17, 1961, suddenly loses that protection when a petition is filed to make a long-term change in the license that was issued based on that application. If the Legislature had intended such a result, it could have said so, but it did not. Apparently the Legislature concluded that the new burdens it intended to impose on water users by virtue of section 12230 et seq. should not be visited on any water projects that were already in the works by June 1961. Since the licenses at issue here pertain to such projects, the Board properly concluded that section 12230 et seq. had no bearing on its approval of the long-term change petitions of the irrigation districts. By the same token, the trial court properly rejected the fifth cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).

2. *Challenge To The Mokelumne Agreement*

East Bay Municipal Utility District (East Bay MUD) holds appropriative rights to divert and store water from the Mokelumne River under a license and a permit. In a proceeding before the Federal Energy Regulatory Commission, East Bay MUD entered into a settlement agreement with the United States Fish and Wildlife Service and the California Department of Fish and Game to establish conditions in its FERC license to protect fish and wildlife resources in the Mokelumne River system (the Mokelumne Agreement). East Bay MUD's FERC license was subsequently amended to include the schedule of flows from the Mokelumne Agreement.

In the water rights proceeding to implement the flow-dependent objectives in the 1995 Bay-Delta Plan, East Bay MUD proposed that its responsibility to help meet those objectives be limited to the flow requirements established in the Mokelumne Agreement. The Board compared those flow requirements to various alternatives analyzed in the implementation EIR and determined that "it would not be in the public interest to require more water from the Mokelumne River system than will be provided under the" Mokelumne Agreement. The Board amended East Bay MUD's license and permit accordingly.

The Central Delta parties challenged the Board's action with respect to the Mokelumne Agreement in a petition for reconsideration, but the Board rejected that challenge.

In the eleventh cause of action in their non-CEQA writ petition, the Central Delta parties alleged that the Board's "findings regarding the Mokelumne Agreement are not supported by substantial evidence and are inappropriate." The Central Delta parties also argued to the trial court that "[n]o notice was given that instream flow requirements on the Mokelumne River were to be established."

The trial court rejected these arguments, concluding that "[t]he Board's notice of the D-1641 proceeding was sufficient to alert other water users and interested persons of the Mokelumne River flow changes ultimately adopted by the Board" and that "[s]ubstantial evidence supports the Board's decision to adopt the flow releases it did for" East Bay MUD.

On appeal, the Central Delta parties assert the identical arguments they made before the trial court, claiming lack of notice and insufficiency of the evidence. On the notice issue, we find the trial court's reasoning-unchallenged by the Central Delta parties-persuasive. Adequate notice was given that the Board would consider flow requirements for the Mokelumne River because the Board's original notice of public hearing provided notice that the Board would "consider implementing the flow-dependent objectives in the 1995 Bay-Delta Plan by allocating responsibility among water right holders to meet water flows and by requiring changes in the operations of facilities used in the diversion and use of water. The hearing will focus on the responsibilities under the water rights listed in Enclosure 2(a)."[27] Among the water rights listed on that enclosure were the license and permit belonging to East Bay MUD.

On the substantial evidence issue, East Bay MUD contends the Central Delta parties have forfeited that challenge by offering a one-sided recitation of the evidence. We agree. "When an appellant challenges an administrative decision as unsupported by substantial evidence in light of the record as a whole, it is [the] appellant's burden to demonstrate that the administrative record does not contain sufficient evidence to support the agency's decision." (*International Brotherhood of*

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[27] The revised notice of public hearing contained almost identical language, differing only in the following respect: "The hearing will focus on the responsibilities *of the holders of* the water rights listed in Enclosure 2(a)." (Italics added.)

Electrical Workers v. Aubry (1996) 42 Cal.App.4th 861, 870, 50 Cal.Rptr.2d 1.) A recitation of only the part of the evidence that supports the appellant's position "is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if, as [the Central Delta parties] here contend, 'some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence.* Unless this is done the error is deemed to be waived.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362; *See In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2, 13 Cal.Rptr.3d 786, 90 P.3d 746 [loss of right to challenge ruling on appeal properly termed forfeiture, not waiver].) Essentially, this rule rests on the premise that if the appellants fail to present us with all the relevant evidence, then the appellants *cannot* carry their burden of showing the evidence was insufficient to support the agency's decision because support for that decision may lie in the evidence the appellants ignore.

Such is the case here. In asserting insufficiency of the evidence, the Central Delta parties ignore evidence that the flows in the Mokelumne Agreement "were developed based on information gathered during extensive monitoring and research regarding anadromous fish in the lower Mokelumne River" and evidence that requiring additional flows from East Bay MUD's reservoirs would "substantially deplete storage levels in some years, increasing the risk that water supply will become unavailable for instream uses and increasing the likelihood that the hypolimnion (cold water) portion of those reservoirs would be lost." Without addressing this evidence, the Central Delta parties simply cannot prevail on their challenge to the sufficiency of the evidence. "'Unless it can be demonstrated that the board's actions are not grounded upon any reasonable factual basis the courts should not interfere with its discretion or substitute their discretion for that of the board.'" *(Bank of America v. State Water Re-*

sources Control Bd. (1974) 42 Cal.App.3d 198, 208, 116 Cal.Rptr. 770.) Here, the Central Delta parties have failed show the absence of a reasonable factual basis for Decision 1641's adoption of the flow requirements in the Mokelumne Agreement. Accordingly, the trial court properly rejected the eleventh cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).

3. *Challenge Based On The Davis-Dolwig Act*

Section 11900 is a statement of findings and a declaration by the Legislature supporting the Davis-Dolwig Act (§§ 11900-11925), which deals with fish and wildlife and recreation in connection with state water projects.[28] Essen-

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[28] Section 11900 provides in full:

"The Legislature finds and declares it to be necessary for the general public health and welfare that preservation of fish and wildlife be provided for in connection with the construction of state water projects.

"The Legislature further finds and declares it to be necessary for the general public health and welfare that facilities for the storage, conservation or regulation of water be constructed in a manner consistent with the full utilization of their potential for the enhancement of fish and wildlife and to meet recreational needs; and further finds and declares that the providing for the enhancement of fish and wildlife and for recreation in connection with water storage, conservation, or regulation facilities benefits all of the people of California and that the project construction costs attributable to such enhancement of fish and wildlife and recreation features should be borne by them.

"The Legislature further finds and declares it to be the policy of this State that recreation and the enhancement of fish and wildlife resources are among the purposes of state water projects; that the acquisition of real property for such purposes be planned and initiated concurrently with and as a part of the land acquisition program for other purposes of state water projects; and that facilities for such purposes be ready and available for public use when each state water project having a potential for such uses is completed."

tially, the purpose of the Davis-Dolwig Act was to ensure: (1) that in the planning and construction of state water projects, the Department would include features for recreation and the enhancement of fish and wildlife; and (2) that the costs of constructing and maintaining those features would not be borne by the agencies that contracted to receive water from the projects. (*See* §§ 11901, 11910, 11912.) Instead, those costs would be paid from the state general fund or from bonds (*See* §§ 11913, 11922-11922.6), because, as section 11900 makes clear, "providing for the enhancement of fish and wildlife and for recreation . . . benefits all of the people of California." On the other hand, the costs of the projects attributable to the *preservation* of fish and wildlife (as opposed to their enhancement) would be passed on to the contractors. (*See* § 11912.)

In commenting on the draft implementation EIR, the Central Delta parties asserted that the EIR failed to set forth and evaluate the requirements of the Davis-Dolwig Act. In response, the Board asserted that the upcoming hearing was "the appropriate forum in which to address water right legal issues."

If the Davis-Dolwig Act was raised again during the hearing, it has not been brought to our attention. In the ninth cause of action in their non-CEQA writ petition, however, the Central Delta parties alleged that in adopting Decision 1641, the Board failed to comply with section 11900 because the Board "failed to determine and quantify the portion of the water required to meet the 1995 [Bay-Delta] Plan" (1) "which represents the obligations of the SWP and CVP to preserve fish and wildlife" and (2) "which constitutes enhancement of fish and wildlife or is necessary to meet recreational needs which is the burden of the people of the State of California (general fund)."

If the trial court expressly ruled on these allegations, again it has not been brought to our attention. Nevertheless, at the

very least the trial court implicitly found no merit in these allegations, and neither do we. The Central Delta parties argue that the Board "has a duty to give the policy declarations contained [in section 11900] their full force and effect" and therefore "should as a prerequisite to allocation of any of the burden of meeting the 1995 [Bay-Delta Plan] to any water user other than the SWP and CVP be first required to establish the portion of the requirements required for mitigation, preservation, and enhancement." They are wrong. The substantive provisions of the Davis-Dolwig Act impose no obligation on the Board whatsoever. Moreover, while the statement of findings and declaration in section 11900 is obviously of assistance in interpreting the substantive provisions of the Davis-Dolwig Act, that section does not, on its own, impose any requirement on anyone, let alone the Board. Accordingly, this argument fails, and the trial court properly rejected the ninth cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).

4. *Challenge To Implementation Of The Export Pumping Limits*

In the 1995 Bay-Delta Plan, to protect fish and wildlife, the Board adopted objectives limiting the rate at which water can be pumped from the Delta for export. In Decision 1641, the Board implemented the export limit objectives permanently by amending the pertinent permits of the Bureau and the Department to require that those objectives be met.[29]

In the first cause of action in their non-CEQA writ petition, the Central Delta parties alleged the export pumping limits implemented in Decision 1641 would result in injury to legal

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[29] The Board noted that the Bureau and the Department had been "operating in accordance with [the objectives for export pumping rates] since the [Board] adopted the 1995 Bay-Delta Plan."

users of water. The trial court implicitly rejected these allegations.

On appeal, the Central Delta parties again argue that "[t]he Board allowed exports to increase over what was previously authorized, an increase which will harm legal users."

This argument need not detain us long. The "no injury" rule the Central Delta parties *Seek* to invoke applies only to the Board's approval of petitions that, by statute, require a finding of no injury to other water users-like the petitions for long-term changes by the irrigation districts we have discussed already. The Board's implementation of the objectives for export pumping limits in the 1995 Bay-Delta Plan was not subject to any such statute. Perhaps more importantly, the Central Delta parties' complaint about the implementation of those objectives is really an untimely attack on the objectives themselves. If the Central Delta parties believed the objectives for export pumping limits in the 1995 Bay-Delta Plan were too high, that was an argument they needed to raise in a challenge to the 1995 Bay-Delta Plan itself.

For these reasons, the trial court properly rejected this aspect of the first cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).

B

The San Joaquin County Parties' Challenges To Implementation Of The 1995 Bay-Delta Plan

In April 2000, various parties interested in water from New Melones filed a petition for writ of mandate seeking to modify Decision 1641.[30] (*County of San Joaquin v. State*

[30] These parties were the County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, City of Stockton, Stockton East Water District, and Central San Joaquin Water Conservation District. We will refer to them collectively as the San Joaquin County parties.

Water Resources Control Board (Super. Ct. S.F. City and County, 2003, No. 311499).) The County of San Joaquin case was one of the cases added to this coordinated proceeding in November 2000.

In their petition,[31] the San Joaquin County parties set forth various challenges to the Board's decision to the extent the Board imposed terms and conditions on the Bureau's New Melones permits for meeting the Vernalis salinity objective, the Delta outflow objective, and the Vernalis flow objectives. The trial court rejected all of those challenges and entered judgment denying the San Joaquin County parties' writ petition.

Before we address the specific arguments of the San Joaquin County parties, we reiterate the substance of the Board's Decision 1641 regarding the New Melones permits.

With respect to the Vernalis flow objectives, the Board amended the Bureau's New Melones storage permits to require the Bureau to meet those objectives, except for the Vernalis pulse flow objective, during the term of the San Joaquin River Agreement, but the Board specifically provided that the Bureau was not required to "use water under these permits to meet [the Vernalis flow objectives] if it uses other

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North San Joaquin Water Conservation District (NSJWCD) was also a petitioner in the County of San Joaquin case; however, NSJWCD was specifically named as a petitioner in only one cause of action in the petition. The trial court ruled against NSJWCD on that cause of action, but NSJWCD was not named as an appellant in the notice of appeal filed by the San Joaquin County parties, and the San Joaquin County parties do not raise any issue on appeal with respect to that aspect of the trial court's ruling.

[31] The allegations of the San Joaquin County parties that we recount hereafter are taken from the second amended petition for writ of mandate they filed in June 2001. For some reason, the San Joaquin County parties called this document a "supplement" to their first amended writ petition.

sources of water or other means to meet these" objectives. (Decision 1641, p. 160, fn. 87.)

With respect to the Vernalis salinity objective, the Board added a term to the New Melones storage permits which provided that "[i]n conjunction with other measures to control salinity, Permittee shall release water from New Melones Reservoir to maintain the Vernalis agricultural salinity objective." The Board added to the New Melones direct diversion permit a condition which provided that "[f]or the protection of water quality, no diversion is authorized for consumptive uses under this permit unless [the Vernalis salinity objective] is met . . . ." For all three of these permits, the Board specified that the Bureau could "meet these objectives through flows or other measures." In addition, for the two New Melones storage permits, the Board provided that the Bureau did not have to "use water under these permits to meet [the Vernalis salinity objective] if it uses other sources of water or other means."

Finally, the Board assigned responsibility for meeting the Delta outflow objective to both the Bureau and the Department by adding a term to all of the CVP and SWP licenses and permits requiring the Bureau and the Department to ensure that the Delta outflow objective be met on an interim basis. (Decision 1641, p. 146.)

1. *Section 11460*

Section 11460, which was "originally enacted as part of the Central Valley Project Act of 1933" (29 Ops.Cal.Atty.Gen. 136, 137 (1957)), provides: "In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial

needs of the watershed, area, or any of the inhabitants or property owners therein."[32]

Although on its face section 11460 applies only to the Department, section 11128 makes the statute applicable to the Bureau as well.[33]

In seeking reconsideration of the original Decision 1641, the San Joaquin County parties argued that section 11460 required the Bureau "to provide New Melones water to them" "in preference to meeting the objectives" in the 1995 Bay-Delta Plan. In essence, they claimed releasing water from New Melones to address Delta water quality objectives would deprive them of the prior right to that water, which was reasonably required to supply their beneficial needs.[34] The Board disagreed, concluding that section 11460 did not apply

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[32] At least one court has referred to sections 11460-11463 as "the Watershed Protection Act." (*United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 138, 227 Cal.Rptr. 161.) That court erroneously stated the statutes were enacted "contemporaneous[ly] with [the] legislation authorizing construction of the CVP" (*ibid.*), when in fact those statutes were enacted as *part* of that legislation-namely, section 11 of the Central Valley Project Act of 1933. (Stats.1933, ch. 1042, § 11, pp. 2650-2651.) The provisions of section 11 were later divided into separate sections on the enactment of the Water Code. (1943 Stats., ch. 368, p. 1751.) It has apparently been a long practice to refer to sections 11460-11463 as "the 'watershed protection' statute." (25 Ops. Cal.Atty.Gen. 8, 9 (1955).) To avoid confusion, however, we will simply refer to these statutes by their section numbers.

[33] "The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part." (§ 11128.)

[34] In their arguments under section 11460, the Central Delta parties do not rely on their own right to New Melones water, but instead rest their arguments on the rights of the San Joaquin County parties.

because that statute "protects the areas of origin from *exports* of water to other Fareas" and no water was being exported from New Melones.[35]

In the first and fourth causes of action in their writ petition, the San Joaquin County parties reasserted that by amending the Bureau's New Melones permits to impose responsibility on the Bureau for meeting the Vernalis salinity objective, the Delta outflow objective, and the Vernalis flow objectives with releases from New Melones, the Board, in adopting Decision 1641, violated section 11460. The Central Delta parties made similar allegations in the seventh cause of action in their non-CEQA writ petition.

The trial court disagreed, stating: "By its terms, [section 11460] strictly applies to [the Department] or other state and federal agencies actually operating units of the Central Valley Project. The [Board] does not operate projects, and the protections of [section 11460] cannot be directly enforced against that regulatory agency in this writ proceeding."

On appeal, the San Joaquin County parties contend section 11460 "is not one of the policies entrusted to the [Board] to weigh and balance; rather, it acts as an absolute restriction on the projects' operations and part of the 'laws of the state' that must be adhered to when the [Board] administers water rights." They further contend "[t]he . . . Board cannot impose permit terms requiring [the Bureau] to operate the CVP in a manner violating Section 11460 any more than it could direct [the Bureau] to operate the CVP in a manner that allows it to take an endangered species." In their appeal, the Central Delta parties argue more generally that the Board "has failed to carry out its duty not to approve changes in the terms and

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[35] Like the Board, we will use the term "area of origin" in place of the more cumbersome phrase-"a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom"-used in section 11460.

conditions of the water rights under its jurisdiction which violated" section 11460.

No party to this proceeding, not even the Board itself, has offered any argument in support of the trial court's reasoning regarding section 11460. Nevertheless, there is a reasonable basis for the court's view. Read in conjunction with section 11128, section 11460 operates as a prohibition only on a state or federal government agency that constructs or operates part of the CVP. On its face at least, the statute does not purport to limit the Board's power in administering water rights. This reading of the statute is bolstered by section 11461, which, as the trial court observed, provides that "the provisions of this article shall be strictly limited to the acts and proceedings of the department, as such, and shall not apply to any persons or state agencies." Significantly, the San Joaquin County parties do not address section 11461.

Although section 11460 does not directly apply to the Board in its role as an administrator of water rights, this does not mean the statute is altogether inapplicable to the Board. If the Board were to impose a term or condition in a permit that *required* the Bureau to operate the CVP in violation of section 11460, we have little doubt that an interested party could *seek* relief from that term or condition on the ground that the Board had not proceeded in the manner required by law. But if the terms of a permit issued by the Board give the Bureau a range of choices in operating the CVP-only one of which might violate section 11460-there is no basis for challenging *the Board's decision* based on section 11460. As long as the Bureau has the right under its permit to operate the CVP consistently with section 11460, any violation of the statute would result solely from the Bureau's actions, rather than from the Board's decision.

Such is the case here. In Decision 1641, the Board did not *require* the Bureau to release water from New Melones to meet the Vernalis salinity objective, the Delta outflow

objective, or the Vernalis flow objectives. The Board did use mandatory language in the permit term that it added to the New Melones storage permits, when providing that the Bureau "shall release water from New Melones Reservoir to maintain the Vernalis agricultural salinity objective" "[i]n conjunction with other measures to control salinity." When that permit term is read as a whole, however, it is clear that what appears to be mandatory is actually optional. The permit term goes on to specify that the Bureau "may meet [the Vernalis salinity objective] through flow or other measures." The permit term also specifies that the Bureau is "not mandate[d to] use water under these permits to meet these conditions if it uses other sources of water or other means to meet these conditions." Thus, if the Board can meet the Vernalis salinity objective through measures other than releases from New Melones, it has the right to do so.

The same is true of the Bureau's obligation to meet the Delta outflow objective and the Vernalis flow objectives. The Board imposed on *all* the permits and licenses relating to the CVP and the SWP the obligation to meet the Delta outflow objective. Accordingly, the Bureau was not required to meet that objective by releases from New Melones. As for the Vernalis flow objectives, it is subject to the same provision as the Vernalis salinity objective-if the Bureau uses "other sources of water or other means" to meet those objectives, then it need not use water released from New Melones.

The Central Delta parties contend that even "allowing the Bureau the election to take water from New Melones Reservoir . . . to meet water quality and fishery requirements in the Lower San Joaquin River and Delta" "is a clear violation of Water Code section 11460." In a similar vein, the San Joaquin County parties contend that "[o]ffering the United States a narrow opportunity to operate in a manner that would comply with [section 11460] does not cure the . . . Board's violation" because "[t]he . . . Board knew that the United

States would operate to meet the standards with releases from New Melones." In support of this argument, the San Joaquin County parties cite the fact that one of the flow alternatives analyzed in the implementation EIR "assume[d] that the [Bureau would] meet the flows using New Melones Reservoir."

Even if we assume the San Joaquin County and Central Delta parties are entitled to pursue their arguments under section 11460 on this basis, those arguments go nowhere. At their core, those arguments are based on the premise that section 11460 gives priority to the San Joaquin County parties in their use of New Melones water[36] over the beneficial uses the Board sought to protect with the Vernalis flow objectives, the Delta outflow objective, and the Vernalis salinity objective. That premise is false.

Before reaching that issue, however, we pause to address an argument made by the Board and others. According to the Board, the San Joaquin County parties cannot claim the protection of section 11460 because that statute does not guarantee watershed protection to CVP contractors.

The Board's construction of section 11460 rests on a 50-year-old opinion by the Attorney General. (25 Ops.Cal. Atty.Gen. 8 (1955).) In that opinion, the Attorney General stated that section 11460 grants "to the entire body of inhabitants and property owners in watersheds of origin" an "inchoate" priority, rather than "any presently vested title or right to any specific quantity of water." (25 Ops.Cal. Atty.Gen., *supra*, at pp. 20-21.) The Attorney General then

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[36] Stockton East Water District and Central San Joaquin Water Conservation District both have contracts with the Bureau for New Melones water. The City of Stockton and San Joaquin County claim to be third party beneficiaries of those contracts. The interest of San Joaquin County Flood Control and Water Conservation District in New Melones water is unclear.

stated that "[a]s the need of such an inhabitant develops he must comply with the general water law of the state, both substantively and procedurally, *to apply for and perfect a water right* for water which he then needs and can then put to beneficial use . . . ." (*Id.*, p. 21, italics added.)

Relying on the italicized language from the Attorney General's opinion, the Board contends "the perfection of the inchoate right granted by Section 11460 *require[s]* the filing of an appropriative water right application." (Italics added.) In other words, according to the Board, section 11460 does not give any priority to an inhabitant of an area of origin who already has (or seeks) a contract with the Bureau (or the Department) for water from the area of origin. Instead, to claim the benefit of section 11460, the inhabitant *must* apply for and obtain an appropriative water right of his or her own.

We cannot agree with this construction of section 11460. Nothing in the statute itself imposes such a limitation, nor is the Attorney General's opinion persuasive authority for the proposition that a CVP contractor cannot claim the benefit of section 11460 because nowhere in the opinion did the Attorney General address that issue. (Cf. *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195, 81 Cal.Rptr.2d 521, 969 P.2d 613 ["[a]n opinion is not authority for propositions not considered"].) To the extent section 11460 reserves an inchoate priority for the beneficial use of water within its area of origin, we *See* no reason why that priority cannot be asserted by someone who has (or *See*ks) a contract with the Bureau for the use of that water. (*See* Robie & Kletzing, *Area of Origin Statutes—The California Experience* (1979) 15 Idaho L.Rev. 419, 436-438 [discussing right of area of origin users to contract with Department for SWP water].) This does not mean a user within the area of origin can compel the Bureau to deliver a greater quantity of water than the user is otherwise entitled under the contract. It simply means the Bureau cannot reduce that

user's contractual allotment of water to supply water for uses outside the area of origin, absent some other legal basis for doing so that trumps section 11460.

As between competing uses within the area of origin, however, section 11460 grants no priority. As the Board explained in its order on reconsideration: "Section 11460 does not establish a preference for any particular type of use within the area of origin, such as irrigation or municipal use, over other uses within the area of origin, such as protection and enhancement of water quality." Thus, all beneficial uses within the area of origin stand on equal footing under section 11460.

Here, the San Joaquin County parties *Seek* to elevate *their* beneficial use of water from New Melones over other beneficial uses of that water within the area of origin. As we have noted, the Vernalis salinity objective protects agricultural uses in the southern Delta, while the Delta outflow objective and the Vernalis flow objectives protect fish and wildlife in the Delta. Thus, water released from New Melones to meet these objectives is used to supply the beneficial needs of agriculture and fish and wildlife in the Delta. Even if we were to assume the Delta is not within the "watershed" of the Stanislaus River,[37] the Delta certainly is "an area immediately

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[37] This proposition is dubious, at best. In 1957, the Attorney General issued an opinion concluding that, for purposes of section 11460, "[i]n the case of rivers which flow into the ocean, the watershed is 'the whole region or area contributing to the supply' of such a river." (29 Ops.Cal. Atty.Gen. 136, 138 (1957).) The Attorney General further concluded that the Feather River does not have a separate watershed from the Sacramento River. According to the Attorney General, "there can be no separate or subsidiary 'watersheds of origin' within the watershed of the Sacramento River in its entirety. All of the lands in the region are within the one 'water shed' to which the statute is capable of practical application." (*Ibid.*)

Under this reasoning, the Stanislaus River does not have a separate watershed from the San Joaquin River, and the watershed of the San Joaquin River encompasses at least that part of the Delta into which water

adjacent [to that watershed] which can conveniently be supplied with water therefrom." Thus, the Delta is within the area of origin for water from the Stanislaus River, and section 11460 grants no priority to the beneficial uses to which the San Joaquin County parties *Seek* to put that water over beneficial uses of that water in the Delta.

The San Joaquin County parties *Seek* to avoid the impact of this conclusion by arguing that water from New Melones is needed to meet the Vernalis salinity objective, the Delta outflow objective, and the Vernalis flow objectives only because of the adverse effects from the export of other water from the Delta. According to them, water originating in the Trinity, Sacramento, and American Rivers is exported from the Delta "into the Delta-Mendota Canal where it is used in the San Joaquin Valley." This water is then used to irrigate lands on the west side of the valley, which results in the discharge of saline drainage water into the San Joaquin River. This excess salinity is then mitigated by the release of water from New Melones, which results in less water for the San Joaquin County parties to use. According to the San Joaquin County parties, "there is no functional difference if water needed within the watershed is appropriated for direct export or used by the project indirectly to mitigate adverse project impacts within the Delta."

Although this argument may have some surface appeal, it does not withstand scrutiny. Section 11460 is not concerned with *why* a particular beneficial need for water exists within the area of origin. For example, it does not matter why there is excess salinity at Vernalis or why there is reduced outflow from the Delta. What matters is that these conditions exist, they have adverse impacts on beneficial uses of water in the Delta, and releases from New Melones can be used to

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from the river flows on its way to the ocean through the San Francisco Bay.

mitigate those impacts. To the extent water from New Melones is being used for those purposes, it is being used to supply the beneficial needs of the area of origin, and the San Joaquin County parties cannot assert any priority to that water under section 11460 for their consumptive use of the water. Even if more New Melones water might be available for consumptive use by the San Joaquin County parties if the Bureau found other ways to mitigate the adverse impacts of exports on the Delta, that does not mean the Bureau is violating section 11460 by using New Melones water to mitigate those impacts.[38] The fact that the Bureau is releasing New Melones water for beneficial use in the Delta, instead of exporting that water outside its area of origin, makes all the difference for purposes of section 11460 because the area of origin is not being deprived of that water, either directly or indirectly.[39]

For the foregoing reasons, the trial court properly rejected the first and fourth causes of action in *County of San Joaquin v. State Water Resources Control Board* (Super. Ct. S.F. City

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[38] Stockton East Water District has asked us to take judicial notice of "historical CVP [water supply] allocations" from 1997 through 2005, purportedly to show "disparate impact to the New Melones Contracts after implementation of Decision 1641." We deny that request because whether Decision 1641 has had a "disparate impact" on users of New Melones water like the San Joaquin County parties is irrelevant to the legal issues we resolve in this opinion. For the same reason-irrelevance-we deny Stockton East Water District's requests that we take judicial notice of a stipulation and order in a federal case the district is involved in and of pages from a federal government report on the Stanislaus River basin.

[39] Even if the Bureau were "exporting" water from New Melones to irrigate the saline lands on the west side of the San Joaquin Valley, it is questionable whether the San Joaquin County parties would have any ground for complaint under section 11460. If the reasoning from the Attorney General's 1957 opinion is correct (29 Ops.Cal.Atty.Gen., *supra,* at p. 138), then those lands are part of the watershed of the San Joaquin River, and the San Joaquin County parties cannot assert any priority against another beneficial use within the watershed.

and County, 2003, No. 311499) and the seventh cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502) to the extent that cause of action was based on section 11460.

2. *Unreasonable Use Of Water*

Article X, section 2 of the California Constitution provides: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

In *See*king reconsideration of Decision 1641, the San Joaquin County parties argued that "requiring the [Bureau], as a condition of its New Melones permits, to meet the objectives [in the 1995 Bay-Delta Plan] requires an unreasonable use of water." The Board rejected this argument "because the [Bureau] is not required to release the water from New Melones; it is simply required to make sure water gets to Vernalis in the amounts and at the times specified." The Board's order on reconsideration further noted that "the New Melones project, unlike the other CVP facilities, is in a location close to Vernalis where it can conveniently meet the objectives at Vernalis by water releases, and has historically been required to meet Vernalis objectives, whereas other CVP facilities have less influence on Vernalis flows."

In the twelfth cause of action in their writ petition, the San Joaquin County parties renewed their argument that using water from New Melones "to dilute polluted [i.e., saline] water without implementation of other available management controls constitute[s] an unreasonable use of water under the Constitution." In the eighth cause of action in their non-CEQA writ petition, the Central Delta parties alleged that Decision 1641 allows the unreasonable use of water by permitting continued exports to the west side of the San Joaquin Valley, thus allowing the continued degradation of the waters of the San Joaquin River.

Like the Board, the trial court rejected these arguments, stating: "While certain areas contribute more salinity to the river than others, there is no reason why New Melones and the contractors for its water should be exempt from a strategy for addressing salinity in the lower river . . . . [¶] This is not a situation . . . where the Board has blatantly ignored both a wasteful water practice and its own responsibilities under the law. The record indicates that the Board has initiated (perhaps belatedly, in the view of some) a series of reasonably based

and phased regulatory requirements to meet the 1995 Plan's salinity objectives in the lower river."

On appeal, the San Joaquin County parties once again contend that requiring the use of water from New Melones, rather than other "non-flow alternatives," to control salinity at Vernalis amounts to "an unreasonable use of water" in violation of article X, section 2 of the California Constitution. The primary flaw in this argument is that it is based on a misrepresentation of what Decision 1641 requires. As we have explained, in its decision the Board authorized the Bureau to meet that objective "through flow or other measures" and instructed the Bureau that it was not mandated to use water under its New Melones permits if it used other sources of water or other means to meet the salinity objective.

To the extent the San Joaquin County parties can be understood to argue that *any* use of New Melones water to dilute salinity levels at Vernalis amounts to an unreasonable use of water, that argument fails. "What is a reasonable use or method of use of water is a question of fact to be determined according to the circumstances in each particular case." (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139, 60 Cal.Rptr. 377, 429 P.2d 889.) Here, the Board determined that permitting the Bureau to use water from New Melones to dilute salinity levels at Vernalis was reasonable, and the San Joaquin County parties have not shown any error in that determination. Their reliance on *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1270, 54 Cal.Rptr.2d 340, is misplaced because the court's assertion in that case that "[u]se of upstream water to wash out salts downstream is an unreasonable use of water" was an overstatement, given that reasonable use is a question of fact depending on the particular circumstances in each case. There certainly may be cases in which the release of water to dilute saline levels is

unreasonable,[40] but that is not always the case. Here, the San Joaquin County parties have not shown by citing anything in the record that allowing the Bureau to use New Melones water, "[i]n conjunction with other measures to control salinity," necessarily results in an unreasonable use of water.

The argument of the Central Delta parties that "the continued and increased delivery of water to the CVP service areas along the west side of the San Joaquin River" "[w]ithout a specific plan to address the degraded condition of the San Joaquin River and at least meet the 1995 [Bay-Delta Plan] objectives at Vernalis" "result[s] in an unreasonable and unconstitutional use of water," fails for the same reason. The Central Delta parties have not shown that Decision 1641 necessarily results in an unreasonable use of water.

For the foregoing reasons, the trial court properly rejected the twelfth cause of action in *County of San Joaquin v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311499) and the eighth cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).

3. *Substantial Evidence To Support The Board's Decision*

In the third and fifth causes of action in their writ petition, the San Joaquin County parties raised the issue of substantial evidence. They first alleged, "[t]here is no reasonable factual basis for the action of the [Board] imposing a condition solely upon New Melones to release stored water to dilute salinity

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[40] For example, in *United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at pages 143-144, 227 Cal.Rptr. 161, the court concluded that where the maintenance of the necessary salinity level for a riparian industrial user would require the release of 25 acre-feet of water in outflow for every acre-foot of water the riparian diverted, such a use of water would be unreasonable.

levels in the San Joaquin River in order to meet the Vernalis Salinity Standard" because "the [Board] expressly found that the actions of the CVP projects other than that of New Melones are the principal causes of the salinity concentrations exceeding the objectives at Vernalis." They further alleged there was no substantial evidence to support the Board's decision to impose responsibility on the Bureau's New Melones permits to meet the Delta outflow objective and the Vernalis flow objectives. The trial court rejected these arguments, concluding that "[o]ne of the system-wide obligations of the CVP, both under federal and state law, is to satisfy its environmental requirements; and [Decision 1641] properly allows, but does not require, the use of New Melones water for that purpose."

Before addressing the San Joaquin County parties' substantial evidence arguments on appeal, we reiterate our agreement with the Board and the trial court that Decision 1641 permits, but does not require, the Bureau to release water from New Melones to meet the flow and salinity objectives about which the San Joaquin County parties complain. To the extent the arguments of the San Joaquin County parties are premised on their mistaken belief that the Bureau *must* meet those objectives with New Melones water, those arguments fail from the outset.

To be substantial, evidence "'must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.'" (*Bank of America v. State Water Resources Control Bd., supra*, 42 Cal.App.3d at p. 213, 116 Cal.Rptr. 770.) "'Unless it can be demonstrated that the board's actions are not grounded upon any reasonable factual basis the courts should not interfere with its discretion or substitute their discretion for that of the board.'" (*Id.* at p. 208, 116 Cal. Rptr. 770.)

In their reply brief, the San Joaquin County parties suggest that in applying the substantial evidence standard of review, "it is the agency that must support imposition of water right conditions with precise and specific reasons founded on tangible record evidence." While this statement accurately reflects the Board's obligation in making its decision in the first place (*Bank of America v. State Water Resources Control Bd., supra,* 42 Cal.App.3d at p. 213, 116 Cal.Rptr. 770), it does not accurately reflect who bears the burden when a party challenges the Board's decision for lack of substantial evidence. The San Joaquin County parties have it backward, because when an appellant challenges an administrative decision as unsupported by substantial evidence, "it is [the] *appellant's* burden to demonstrate that the administrative record does not contain sufficient evidence to support the agency's decision." (*International Brotherhood of Electrical Workers v. Aubry, supra*, 42 Cal.App.4th at p. 870, 50 Cal.Rptr.2d 1, italics added.) Thus, before the court it is not the Board's responsibility to prove its decision was supported by substantial evidence, it is the responsibility of the San Joaquin County parties to prove it was not. They have not met that burden.

In arguing there is no substantial evidence to support imposition of the Vernalis salinity objective on the New Melones permits, the San Joaquin County parties assert that "[n]owhere has the [Board] identified a single statement of factual evidence showing that the operations of New Melones Reservoir are materially responsible for the salinity problems in the San Joaquin River." The gist of this argument is that, for a permit term to be supported by substantial evidence and grounded on a reasonable factual basis, it must be shown that the problem the Board is trying to address with that permit term was caused by the appropriation of water under that particular permit.

This is incorrect. Under the law, as long as there is any reasonable factual basis for the Board's action, we must defer to its judgment. Here, the Board found that "the actions of the CVP are the principal cause of the salinity concentrations exceeding the objectives at Vernalis." Given this finding, it was reasonable for the Board to impose responsibility for meeting the Vernalis salinity objective on the Bureau and to authorize the Bureau to use its discretion in deciding how to achieve that objective, including using water from New Melones. In its order on reconsideration, the Board observed that "the New Melones project, unlike the other CVP facilities, is in a location close to Vernalis where it can conveniently meet the objectives at Vernalis by water releases, and has historically been required to meet Vernalis objectives, whereas other CVP facilities have less influence on Vernalis flows." This is a reasonable factual basis for permitting the Bureau to meet the Vernalis salinity objective with water from New Melones. Therefore, substantial evidence supports the Board's decision.

That the San Joaquin County parties may receive less water than they otherwise would from the Bureau if New Melones water is used to meet the Vernalis salinity objective does not alter this conclusion. The Board was not required to implement the objectives in the 1995 Bay-Delta Plan in a manner that provided the most water for the San Joaquin County parties. As long as there was a reasonable factual basis for the Board's decision, it was for the Board to weigh all the competing interests in CVP water and decide how best to assure compliance with the objectives to protect, as much as possible, all beneficial uses of water in and around the Delta. The San Joaquin County parties have failed to show that the Board's decision lacked a reasonable factual basis.

With regard to the Delta outflow objective and the Vernalis flow objectives, the San Joaquin County parties make the same argument that we have rejected already. They also argue

that the Delta outflow objective "requires that the water from New Melones reservoir be released for use so far out into the Delta that is not even within the Place of Use for the New Melones Project!" They base this argument on the assertion that the place of use in the New Melones permits "is limited to Tuolumne, Stanislaus, San Joaquin and Calaveras Counties" and on the fact that the outflow index (the measure of Delta outflow) "is measured at three measuring points located within Solano County."

The first flaw in that argument is that the places where the outflow index is measured are not the same as the place where the water required to meet the Delta outflow objective is put to beneficial use. The purpose of the Delta outflow objective is to protect estuarine habitat in the Delta-the theory being that if a certain amount of water is flowing *out* of the Delta (as measured at three places in Solano County), then that water has already served its purpose *within* the Delta of protecting estuarine habitat. Thus, the fact that the outflow index is measured in Solano County does not mean the water is being put to beneficial use there.

The second flaw in the argument is that the San Joaquin County parties have misread the New Melones permits. Two of the permits do provide for the water appropriated under those permits to be used for irrigation, domestic, municipal, and industrial purposes in Stanislaus, Calaveras, Tuolumne, and San Joaquin Counties. In addition, however, those two permits and the third New Melones permit also provide for the water to be used for the enhancement of fish and wildlife in the downstream reaches of the Stanislaus and San Joaquin Rivers. The San Joaquin County parties do not contend that the Delta is not part of the downstream reaches of the San Joaquin River, nor could they. As defined by the Legislature, the Delta encompasses the San Joaquin River upstream to its convergence with (or just below its convergence with) the

Stanislaus River.[41] Thus, the San Joaquin County parties have failed to establish that water from New Melones used to meet the Delta outflow objective is being used outside the place of use authorized in the New Melones permits.

Under the substantial evidence heading, the San Joaquin County parties seek to challenge the trial court's treatment of "the entire CVP as one integrated project." Relying on a document entitled "Long-Term Central Valley Project Operations Criteria and Plan CVP-OCAP" (of which this court has taken judicial notice), the San Joaquin County parties assert that "the New Melones Project is not operationally integrated with the CVP." This assertion is apparently based on a statement in the document that the East Side Division, which includes New Melones, "is a part of the CVP, [but] its operation is not included in the [coordinated operating agreement] and it is operated as a separate feature. It is therefore not discussed in this document."[42]

The San Joaquin County parties fail to explain how this statement regarding New Melones has any bearing on the Board's decision. That the Bureau may have chosen to operate New Melones separately from the rest of the CVP, which it operates in coordination with the Department's operation of the SWP under the coordinated operating agreement, has no bearing on the Board's authority to allow the Bureau to use New Melones water in meeting the objectives in the 1995 Bay-Delta Plan. Accordingly, we do not consider this argument further.

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[41] The boundaries of the Delta are set forth in section 12220, which references an "attached map prepared by the Department of Water Resources titled 'Sacramento-San Joaquin Delta,' dated May 26, 1959." That map can be found at Statutes 1959, chapter 1766, page 4248.

[42] According to the San Joaquin County parties, the coordinated operating agreement is the agreement under which the Bureau and the Department have "determined the water supplies of the CVP and SWP and the satisfaction of in-basin obligations between the two projects."

Also under the substantial evidence heading, the San Joaquin County parties argue that treating the CVP as an integrated project would render the "no injury" rule in section 1702 meaningless. The point of this argument escapes us. Section 1702 applies when an applicant, permittee, or licen*See Seek*s to change "the point of diversion, place of use, or purpose of use from that specified in the application, permit, or license." (§§ 1701, 1702.) Here, the Bureau did not *Seek* to make any such change in its New Melones permits; rather, the Board, in adopting Decision 1641, imposed terms and conditions on those permits to implement the flow-dependent water quality objectives of the 1995 Bay-Delta Plan. Section 1702 has no bearing here. Indeed, elsewhere in their opening brief, the San Joaquin County parties acknowledge that their challenges to the Board's decision "*do not* rely on any form of standing derived from Water Code section 1702 and are not impacted by" the analysis of who is a "legal user of water" for purposes of that statute.[43]

For the foregoing reasons, the trial court properly rejected the third and fifth causes of action in *County of San Joaquin v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311499).

4. *The Delta Protection Act*

a. *The Law*

Sections 12200-12205 are commonly known as the Delta Protection Act. (*See*, e.g., *United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 139, 227

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[43] In this separate argument, the San Joaquin County parties challenge an assertion by the trial court that "[s]ince [they] are contractors of the Bureau, they do not have standing to challenge or complain of the characteristics of the permits held by the Bureau." Since the trial court addressed the merits of the arguments made by the San Joaquin County parties, despite their supposed lack of "standing," we need not consider whether the trial court's assertion about their standing is correct.

Cal.Rptr. 161.) Section 12200 contains: (1) a statement of findings by the Legislature regarding the salinity problem in the Delta and the role of the Delta in providing a supply of fresh water for water-deficient areas to the south and west; and (2) a declaration of the need for a special law "for the protection, conservation, development, control and use of the waters in the Delta for the public good."

Section 12201 contains a statement of findings by the Legislature of the need for maintaining "an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta . . . and to provide a common source of fresh water for export to areas of water deficiency."

Section 12202 provides in relevant part: "Among the functions to be provided by the State Water Resources Development System,[44] in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento—San Joaquin Delta."[45]

Section 12203 provides: "It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento—San Joaquin Delta to which the users within said Delta are entitled."

Section 12204 provides: "In determining the availability of water for export from the Sacramento—San Joaquin Delta no

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[44] Essentially, the State Water Resources Development System consists of all the facilities making up the SWP and the CVP. (*See* §§ 12931, 12934, subd. (d).)

[45] The remainder of section 12202, which is not relevant here, deals with the provision of "a substitute water supply" to Delta water users.

water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter."

Section 12205 provides: "It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part."

As we read these rather vague statutes, the Delta Protection Act recognizes the importance of providing salinity control and an adequate water supply in the Delta to serve dual goals: (1) maintaining and expanding agriculture, industry, urban, and recreational development in the Delta; and (2) providing fresh water for export to areas of water deficiency. As between these two goals, however, the Delta Protection Act gives preference to the first. Thus, no one may divert water from the Delta that is necessary for salinity control or to provide an adequate water supply for users within the Delta. What the Delta Protection Act does *not* specify is: (1) what is an adequate supply of water for users within the Delta; and (2) what level of salinity control must be provided. (*See United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 139, 227 Cal.Rptr. 161.)

b. *Factual Background*

At some point in the water rights proceeding before the Board, South Delta Water Agency apparently asserted an argument in opposition to the petitions for long-term changes in the licenses of the irrigation districts based on the Delta Protection Act.[46] In its response to that argument in its original Decision 1641, the Board stated that "if water users

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[46] Although we must presume the argument was made because the Board responded to it, we have been unable to locate the argument in the administrative record, and no party has brought its location to our attention.

in the Delta do not have existing water rights adequate for their uses, the Delta Protection Act does not ensure the water users in the Delta a water supply unless they buy the water and provide adequate compensation to the [Department] for the water, pursuant to Water Code section 11462."

In petitions for reconsideration, various parties-including the Central Delta parties and some of the San Joaquin County parties-complained about the Board's treatment of the Delta Protection Act. With little analysis, Stockton East Water District argued the Board had committed an error of law by narrowly construing the Delta Protection Act. The City of Stockton likewise argued that the Board's decision contained an "overly narrow interpretation of the Delta Protection Act." The County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District argued that the Board had "fail[ed] to implement" the Delta Protection Act because the Board's decision did not ensure sufficient water supply and water quality for water users in the Delta. For their part, the Central Delta parties argued that the Delta Protection Act "mandates . . . releases from storage for the benefit of the Delta . . . even if such flow would not have been available under 'natural flow' conditions."

In response to the petitions for reconsideration, the Board deleted its original analysis of the Delta Protection Act and substituted the following in Decision 1641: "[South Delta Water Agency] claims to represent legal users of water who would be injured as a result of the long-term water right changes. [South Delta Water Agency] argues that in-Delta water users have a right to have water provided to them by the [Department] and the [Bureau] pursuant to the Delta Protection Act, even if they have no water available to them under riparian or appropriative water rights at a given time. Whether or not the [Department] and the [Bureau] have an obligation to provide water to in-Delta water users, however,

is irrelevant to the question of whether the long-term changes will cause injury to a legal user of water."

In the fourth cause of action in their non-CEQA writ petition, the Central Delta parties alleged that Decision 1641 violates the Delta Protection Act because it allows for the diversion of water that is not surplus to the needs of Delta water users and "causes water level and water quality degradations . . . and harms fish and wildlife." They also alleged in their seventh cause of action that the Board had failed to enforce the requirements of the Delta Protection Act.

In the eighth cause of action in their writ petition, the San Joaquin County parties similarly alleged that Decision 1641 violates the Delta Protection Act because, in essence, the decision "allows for increased rates of diversion and increased total exports of water from the Delta by the SWP and the CVP over what would have been allowed without the Decision," thus "decreasing the amount of water available [to water users in the Delta], lowering the levels of water, . . . and . . . worsening water quality."

The trial court rejected these arguments, stating that under the Delta Protection Act, "[i]n-Delta users can contest new proposals to export water as potential violations of this act. In-Delta users can enforce their riparian rights and pre-project appropriative rights in a water rights enforcement proceeding. They can also apply for a new in-Delta permit or project that would have automatic priority over existing and future exports. [¶] What in-Delta users cannot do is to challenge [Decision 1641] as violating the Delta Protection Act. The ambiguity of the statute's salinity control protection invites a specific determination by the [Board] to be afforded deference by the Court. [Citation.] The competing purposes of section 12201 further invites a public interest balancing of in-Delta needs and export needs by the [Board], which it has done reasonably in [Decision 1641]. Petitioners have failed to demonstrate that the decision was reached in an arbitrary or

capricious fashion . . . . [¶] Additionally, the record is convincing that salinity conditions in the Delta will improve and annual CVP and SWP exports will be reduced as the result of [Decision 1641]. [Citation.] Modest salinity exceedances may occur in drought years when exporters face as much as 745,000 [acre-feet] reductions. [Citation.] Water quality and conditions for fish and aquatic resource generally improve for many areas within the Delta."

c. *Legal Analysis*

On appeal, the San Joaquin County parties argue, "[t]he record is replete with evidence that the operations approved by the [Board] will injure Delta water users in violation of the Delta Protection Act." They contend, "there is no evidence in the record that the Bureau will [meet the Vernalis salinity objective] or is capable of doing so." They also argue that the Board authorized exports "despite the evidence that Delta water users do not receive adequate water supply."

For their part, the Central Delta parties argue that the Delta Protection Act gives Delta riparians and appropriators a right to water stored upstream by others.

Addressing first the arguments of the San Joaquin County parties, since the adequacy of the water quality objectives in the 1995 Bay-Delta Plan is not before us we must presume that the Vernalis salinity objective from the 1995 Bay-Delta Plan adequately provides for salinity control consistent with the requirements of the Delta Protection Act. In our view, the question is whether the Board adequately allocated responsibility for meeting the Vernalis salinity objective in Decision 1641 and whether its allocation of responsibility overall for meeting the objectives in the 1995 Bay-Delta Plan left the water users in the Delta with an adequate water supply. We are not concerned with possible violations of the Vernalis salinity objective that *may* occur under the Board's decision, because the San Joaquin County parties have not

shown that *any* allocation of responsibility by the Board could guarantee 100 percent compliance with that objective. Moreover, we must reiterate that the Delta Protection Act provides no clear standard for determining what is an adequate supply of water for users in the Delta. We agree with the trial court that since the Delta Protection Act *See*ks to serve the dual goals: (1) maintaining and expanding agriculture, industry, urban, and recreational development in the Delta; and (2) providing fresh water for export to areas of water deficiency, it is for the Board in the first instance to balance "in-Delta needs and export needs" and to determine whether in-Delta needs receive an adequate supply of water. So long as the Board had a reasonable factual basis for its action, we should not interfere with its discretion or substitute our discretion for that of the Board. (*Bank of America v. State Water Resources Control Bd., supra*, 42 Cal.App.3d at p. 208, 116 Cal.Rptr. 770.) Furthermore, as the parties seeking to overturn the Board's decision, the San Joaquin County parties bore the burden of showing that there is no such basis. They have not met that burden.

The San Joaquin County parties fail to provide any comprehensive overview of the evidence the Board had before it in deciding how to allocate responsibility for meeting the water quality objectives of the 199[illegible] Bay-Delta Plan. Instead, they pick and choose pieces of the record in an attempt to demonstrate the Board's action did not comply with the Delta Protection Act. For example, the San Joaquin County parties assert that "the Bureau will . . . violate the salinity standards as much as 15 percent of the time during the irrigation season." In support of that assertion, they cite a passage from the trial court's statement of decision, where the trial court noted the *argument* of the Central Delta parties "that, in their view, the Bureau will violate the salinity standards as much as 15 percent of the time during the irrigation season." Obviously, an argument by a party, restated in the trial court's decision, is not *evidence* that was before the Board.

On another point, the San Joaquin County parties contend the Board authorized exports from the Delta "despite the evidence that Delta water users do not receive adequate water supply." In support of that contention, they cite testimony by a farmer with riparian rights in the Delta in which he recounted problems he had experienced in the past, including "[l]ower water levels [that] can actually prevent the operation of syphons and pumps." They also cite what apparently purport to be pictures of low water conditions in the Delta in 1996.

The problem is that these isolated bits of evidence cannot establish, as a matter of law, that the Board violated the Delta Protection Act by not assuring an "adequate" water supply for users in the Delta. What is "adequate" was a matter within the Board's judgment, balancing all of the relevant factors and all of the competing interests in the water that flows through the Delta. The San Joaquin County parties have failed to show that, as a matter of law, on the record as a whole, the Board's action did not provide an "adequate" supply for Delta users. Accordingly, the trial court properly rejected the eighth cause of action in *County of San Joaquin v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311499).

As for the argument of the Central Delta parties that the Delta Protection Act gives Delta riparians and appropriators a right to water stored upstream by others, we disagree. Nothing in the Delta Protection Act purports to grant any kind of water right to any particular party. The Delta Protection Act does preclude the diversion of water from the Delta that is necessary for salinity control or to provide an adequate water supply for users within the Delta; however, it is for the Board to decide, in the exercise of its judgment, what level of salinity control should be provided and what is an adequate supply of water for users in the Delta. Like the San Joaquin County parties, the Central Delta parties have failed to show

that, as a matter of law, on the record as a whole, the Board did not adequately ensure the Vernalis salinity objective would be met or provide an "adequate" supply for Delta users. Accordingly, the trial court properly rejected the fourth and seventh causes of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).

With respect to the San Joaquin County parties, because we have found no merit in any of their challenges to Decision 1641, we will affirm the judgment in *County of San Joaquin v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311499) denying their mandamus petition.

C

The Audubon Society Parties' Challenges To Implementation Of The 1995 Bay-Delta Plan

As previously explained, the 1995 Bay-Delta Plan included a narrative objective for the protection of salmon, which provided for the maintenance of water quality conditions, "together with other measures in the watershed, sufficient to achieve a doubling of natural protection of chinook salmon from the average production of 1967-1991, consistent with the provisions of State and federal law." The program of implementation in the 1995 Bay-Delta Plan identified "timely completion of a water rights proceeding to implement river flow and operational requirements" as well as "other measures" as the means for achieving the narrative salmon protection objective.

In petitions for reconsideration of the original Decision 1641, various parties argued that the Board was "obligated to implement the narrative salmon doubling objective in the southern Delta in the current proceeding." Echoing language in the 1995 Bay-Delta Plan, the Board responded: "The narrative salmon doubling objective may not be fully imple-

mented as a result of this proceeding. The current proceeding addresses implementation of the objectives in the 1995 Bay-Delta Plan that can be implemented through flows. If the requirements in D-1641 and any future decision in this proceeding do not incidentally result in the objectives being met, measures in addition to flow will be needed. Such measures are outside the scope of the current proceeding. Other agencies are working toward meeting the objective. Water Code section 13242, subdivision (a), provides that entities in addition to the [Board] may need to take actions to achieve water quality objectives. Pursuant to section 13242, the program of implementation in the 1995 Bay-Delta Plan states that actions of other agencies will be needed to implement this objective."

In April 2000, five nonprofit organizations[47] filed a petition for writ of mandate and complaint for declaratory relief *Seeking* to set aside Decision 1641. (*Golden Gate Audubon Society v. State Water Resources Control Board* (Super. Ct. Alameda County, 2003, No. 825585-9).) The *Golden Gate* case was one of the cases added to this coordinated proceeding in November 2000.

In the first cause of action in their petition, the Audubon Society parties alleged Decision 1641 was "contrary to law and is not supported by substantial evidence because it" "purport[s] to authorize water rights inconsistent with applicable water quality objectives of the 1995 Bay-Delta Plan." The Audubon Society parties further alleged that Decision 1641 "ignored" the salmon-doubling objective.

In its statement of decision, the trial court framed the issue (raised by the Audubon Society parties and others) as

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[47] These organizations are Golden Gate Audubon Society, Marin Audubon Society, San Joaquin Audubon Society, California Sportfishing Protection Alliance, and Committee to Save the Mokelumne. We will refer to them collectively as the Audubon Society parties.

"whether . . . the [Board] has taken sufficient steps to enforce, as a water rights matter, the narrative salmon objective set forth in the 1995 Bay-Delta . . . Plan."[48] The court concluded that "substantial evidence in the record demonstrates that D-1641 supports and advances the narrative goal of doubling salmon survival."

Based on its rejection of this and other arguments by the Audubon Society parties (some of which we will discuss later in this opinion), the trial court entered judgment denying the Audubon Society parties' writ petition and complaint.

On appeal, the Audubon Society parties renew their argument that the Board "failed to address and implement the salmon doubling requirements . . . established by the Board itself in the 1995 Bay-Delta Plan."[49] They point out that the Board "approved the [San Joaquin River Agreement]/[Vernalis Adaptive Management Plan] in lieu of" the Vernalis flow objectives, and they contend that because the Vernalis flow objectives themselves were insufficient to "achieve the required chinook salmon-doubling," it follows that "the flows called for in the [San Joaquin River Agreement] and [Vernalis Adaptive Management Plan] experiment [will not] achieve the doubling standard, since they are even *less* than

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[48] The Audubon Society parties did not file a brief of their own in the trial court in support of their writ petition, but they did join in the brief filed by the Central Delta parties and a brief filed by the petitioners in *Pacific Coast Federation of Fishermen's Associations v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311507), from which no appeal was taken. The brief from the *Pacific Coast Federation* case raised the same arguments the Audubon Society parties now pursue on appeal in their challenge to the Board's implementation of the narrative salmon protection objective in Decision 1641.

[49] The Audubon Society parties asked to withdraw some of the arguments made in their opening brief because they did not raise them in the trial court, and we granted that request. Accordingly, we do not address those arguments.

the Vernalis standard flows." They also assert that "the [San Joaquin River Agreement] is illusory and unenforceable" because it "provides that if any year any party deems the operations plans for that year to be unacceptable, then the export limitations contained in the [San Joaquin River Agreement]/[Vernalis Adaptive Management Plan] 'shall not apply during the calendar year'" and it is subject to termination at the will of the parties. Based on these assertions, the Audubon Society parties argue that the Board "prejudicially abused its discretion, when it adopted the [San Joaquin River Agreement] and [Vernalis Adaptive Management Plan] in lieu of flows sufficient to double chinook salmon production."

Before turning to the substantive arguments of the Audubon Society parties, we pause to consider their assertion that the Board's action in this water rights proceeding had to be consistent not only with the water quality objectives in the 1995 Bay-Delta Plan, but also with federal "Bay-Delta water quality standards adopted by the Environmental Protection Agency."

As the Board itself explained in the 1995 Bay-Delta Plan, the Environmental Protection Agency disapproved some of the fish and wildlife objectives of the 1991 Bay-Delta Plan because of their failure to protect estuarine habitat and other fish and wildlife. Pursuant to federal law, the Environmental Protection Agency then promulgated its own water quality standards for the Bay-Delta in 1994.

The Audubon Society parties contend that "[t]he supremacy of these federal standards [over the objectives in the 1995 Bay-Delta Plan] is clear." The Board disagrees, pointing out that in September 1995, the Environmental Protection Agency approved the 1995 Bay-Delta Plan, and this approval "means that the 1995 Plan supplants the standards promulgated by EPA."

The Board is correct. Federal law provides that whenever a state revises or adopts a new water quality standard, the new or revised standard must be submitted to the administrator of the Environmental Protection Agency, and "[i]f the Administrator . . . determines that such standard meets the requirements of [federal law], such standard shall thereafter be the water quality standard for the applicable waters of that State." (33 U S C § 1313(c)(2)(A), (c)(3)) Thus, the Board correctly asserts that "as a matter of law, the applicable standards guiding the . . . Board in Decision 1641 are those in the 1995 [Bay-Delta] Plan."

Turning now to the substantive claims of the Audubon Society parties, we begin by noting that their complaint that the San Joaquin River Agreement is "illusory and unenforceable" provides no basis for challenging Decision 1641. As we have previously explained, while the Board allowed performance of the San Joaquin River Agreement, in doing so the Board *required* the Bureau to meet the Vernalis flow objectives during the term of the agreement, with the exception of the Vernalis pulse flow objective. More importantly, the Board required the Bureau to meet *all* of the Vernalis flow objectives if the San Joaquin River Agreement was dissolved before it expired. Thus, even if the San Joaquin River Agreement *is* unenforceable, it makes no difference, because the Board's decision assures the Vernalis flow objectives will be met if the agreement is canceled.

To the extent the Audubon Society parties contend the Board abused its discretion because it failed to do more in this water rights proceeding to achieve the salmon protection objective than implement the Vernalis flow objectives, we agree with the trial court that the Audubon Society parties failed to establish an abuse of discretion by the Board.

The Audubon Society parties argue that the Board had a duty in this water rights proceeding "to determine, based on the record evidence, what flows were necessary to implement

the salmon-doubling standard, and then adopt those flows in Decision 1641, to assure their 'immediate' implementation." This argument misapprehends the relationship between this water rights proceeding and the 1995 Bay-Delta Plan.

Determining what actions were required to achieve the narrative salmon protection objective was part of the Board's obligation in formulating the 1995 Bay-Delta Plan in the first place. (*See* §§ 13050, subd. (j)(3) [a water quality control plan must include "[a] program of implementation needed for achieving water quality objectives"], 13242, subd. (a) [a "program of implementation for achieving water quality objectives" must include "[a] description of the nature of actions which are necessary to achieve the objectives"].) Once the Board established specific flow objectives and the narrative salmon protection objective as part of the 1995 Bay-Delta Plan and then established that part of its program of implementation for the salmon objective would be to allocate responsibility for meeting *those* flow objectives in a water rights proceeding, the Board had no obligation in this water rights proceeding to determine whether *other* flow objectives should be imposed to achieve the salmon objective. Instead, its obligation was to actually implement the specific flow objectives it had committed itself to implementing.

The Board's acknowledgement in the 1995 Bay-Delta Plan of the "uncertain[ty]" that "implementation of the numeric objectives . . . alone will result in achieving the narrative objective for salmon protection" did not compel the Board to consider adopting other flow objectives in this proceeding. This uncertainty was simply offered as the reason why "other measures" "in addition to timely completion of a water rights proceeding" might "be necessary to achieve the [salmon protection] objective."

Nor was the Board obligated to consider adopting other flow objectives because, as the Audubon Society parties put it, "implementation of [the salmon protection] standard [had

to] be 'immediate.'" Again, the Audubon Society parties have misapprehended the requirements of the 1995 Bay-Delta Plan.

In the program for implementation in the 1995 Bay-Delta Plan, the Board stated generally that "[t]he specific actions [to achieve the objectives] identified within [this program of implementation] include time schedules for implementation, if appropriate. If no time schedule is included, implementation should be immediate." (*See* § 13242, subds. (a), (b) [a "program of implementation for achieving water quality objectives" must include "[a] time schedule for the actions to be taken" "which are necessary to achieve the objectives"].) As we have explained already, with respect to the narrative objective for salmon protection, the program for implementation identified "timely completion of a water rights proceeding to implement river flow and operational requirements" as one of the actions that would need to be taken to implement the salmon protection objective. Thus, the "time schedule" for taking this particular action would be met as long as the proceeding was, in fact, timely completed.

Even if the "immediacy" provision in the 1995 Bay-Delta Plan could be deemed to apply in this context, nothing in the 1995 Bay-Delta Plan required the Board to consider or adopt flow requirements in this water rights proceeding other than those it had set in the 1995 Bay-Delta Plan. The Board's commitment to implement "river flow and operational requirements" was a commitment to implement the river flow and operational objectives set within the 1995 Bay-Delta Plan itself. Thus, at most, the 1995 Bay-Delta Plan contemplated the immediate commencement and timely completion of a water rights proceeding to allocate responsibility for meeting the flow objectives set in the plan; it did not contemplate that the water rights proceeding would include the investigation of or allocation of responsibility for meeting flow objectives *other* than those set in the 1995 Bay-Delta Plan.

If the Audubon Society parties are correct in their contention that scientific evidence shows the flows needed to achieve the narrative salmon protection objective must be greater than the Vernalis flow objectives of the 1995 Bay-Delta Plan, then that evidence may provide a basis for *changing* the Vernalis flow objectives in the next regulatory proceeding to review and revise the water quality control plan for the Bay-Delta. It does not, however, provide a basis for challenging the Board's action here. In the 1995 Bay-Delta Plan, the only action to which the Board committed itself in this water rights proceeding with respect to the narrative salmon protection objective was allocating responsibility for meeting the flow objectives *in the 1995 Bay-Delta Plan.*

Of course, as we have previously concluded in connection with the challenges of the Central Delta parties, the Board did not actually carry through on that commitment. By authorizing compliance with the alternate pulse flow objectives of the San Joaquin River Agreement in lieu of the Vernalis pulse flow objective of the 1995 Bay-Delta Plan, the Board failed to do all it had committed itself to do in the 1995 Bay-Delta Plan to implement its objectives. Thus, we agree with the Audubon Society parties that by failing to implement all of the Vernalis flow objectives while the San Joaquin River Agreement is in effect, the Board "fail[ed] to establish the minimum flows necessary to achieve the salmon-doubling standard." Accordingly, the Audubon Society parties were entitled to a writ of mandate on this narrow basis, even though the trial court, in response to the nonCEQA writ petition by the Central Delta parties, ordered a writ to issue that would have the same practical effect.

To the extent the Audubon Society parties argue that by failing to do more in the water rights proceeding to implement the narrative salmon protection objective, the Board violated the public trust doctrine, we disagree.

The public trust doctrine recognizes that "the sovereign owns 'all of its navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people."'" *(National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434, 189 Cal.Rptr. 346, 658 P.2d 709.) "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (*Id.* at p. 446, 189 Cal.Rptr. 346, 658 P.2d 709.) The protection of recreational and ecological values "is among the purposes of the public trust." (*Id.* at p. 435, 189 Cal.Rptr. 346, 658 P.2d 709.)

Seizing on the phrase "whenever feasible," the Audubon Society parties contend that "conflicts between public trust values and competing water uses must, whenever possible, be resolved in favor of public trust protection." They further contend that by failing to do more to implement the narrative salmon protection objective, the Board "failed to comply with its duties under the public trust doctrine to protect the Bay-Delta's fishery resources 'whenever feasible.'"

We are not persuaded. Essentially, the position of the Audubon Society parties appears to be that notwithstanding the flow objectives of the 1995 Bay-Delta Plan, the Board was obligated under the public trust doctrine to implement more generous flow objectives in this water rights proceeding because it would have been "feasible" to do so. What is "feasible," however, is a matter for the Board to determine. In a passage from *National Audubon Society* that the Audubon Society parties ignore, our Supreme Court concluded that when the state, acting through the Board, approves appropriations of water "despite fore*See*able harm to public trust uses," "the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [citation], and to preserve, *so far as consistent with the public interest,* the uses protected by the trust." (*National Audubon Society v. Superior Court, supra*, 33 Cal.3d at pp. 446-447, 189

Cal.Rptr. 346, 658 P.2d 709, italics added.) Thus, in determining whether it is "feasible" to protect public trust values like fish and wildlife in a particular instance, the Board must determine whether protection of those values, or what level of protection, is "consistent with the public interest."

In formulating the 1995 Bay-Delta Plan, the Board set out "to attain the highest water quality which is reasonable, considering *all* demands being made on the water of the [Bay-Delta]." (1995 Bay-Delta Plan, p. 14, italics added.) While the Board had a duty to adopt objectives to protect fish and wildlife uses and a program of implementation for achieving those objectives, in doing so the Board also had a duty to consider and protect all of the other beneficial uses to be made of water in the Bay-Delta, including municipal, industrial, and agricultural uses. It was for the Board in its discretion and judgment to balance all of these competing interests in adopting water quality objectives and formulating a program of implementation to achieve those objectives.

Even disregarding the untimeliness of such a challenge, the Audubon Society parties have not shown that the Board's adoption of the 1995 Bay-Delta Plan was inconsistent with its duty to protect public trust values "so far as consistent with the public interest." If the Board's adoption of a water quality control plan fulfills the Board's duties under the public trust doctrine, then the Board's implementation of that plan-as long as the Board *does* implement that plan-likewise fulfills the Board's duties. To the extent the Board has *failed* to implement all of the flow objectives of the 1995 Bay-Delta Plan, we have determined already that the Audubon Society parties are entitled to writ relief. The public trust doctrine entitles them to nothing more.

In summary, we conclude the trial court erred in rejecting the first cause of action in the Audubon Society parties' writ petition. By failing to implement all of the Vernalis flow objectives while the San Joaquin River Agreement is in

effect, the Board failed to implement the minimum flows necessary to achieve the narrative salmon protection objective and thereby abused its discretion. Accordingly, we will reverse the judgment in *Golden Gate Audubon Society v. State Water Resources Control Board* (Super. Ct. Alameda County, 2003, No. 825585-9) to the extent it denied the Audubon Society parties relief on their first cause of action.

III

Challenges To The Joint Points Of Diversion Petition

Under sections 1701 and 1702, the Board could approve the joint points of diversion petition only if it found that adding points of diversion and rediversion to the permits for the CVP and the SWP would "not operate to the injury of any legal user of the water involved." (§ 1702) In the underlying water rights proceeding, the Board considered arguments by the Central Delta parties that use of the joint points of diversion by the Bureau and the Department would, among other things, lower water levels and adversely affect salinity in the southern Delta.

The Board recognized that under various scenarios, use of the joint points of diversion could lower water levels in the southern Delta. To avoid harming agricultural users in the Delta, the Board determined that "[p]rior to using the [joint points of diversion], the [Department] or the [Bureau] will be required to consult with [South Delta Water Agency] and prepare and submit to the Chief of the Division of Water Rights a response plan specifying actions the [Department] or the [Bureau] will take to ensure that water levels in southern Delta Channels are not lowered to elevations inadequate for diversion of water for agricultural uses because of increased pumping resulting from the use of the [joint points of diversion]. The [Department] or the [Bureau] will not be authorized to divert water using the [joint points of diversion] until the response plan has been approved by the Chief of the

Division of Water Rights. The [Department] or the [Bureau] will be required to implement the response plan." (Decision 1641, p. 105, fn. omitted.)

On the salinity issue, the Board, in Decision 1641, concluded that the evidence did not support the argument that agricultural users in the southern Delta would be adversely impacted by salinity increases due to use of the joint points of diversion. The Board noted that under average flow conditions, any exceedances of the southern Delta salinity objective in June, July, and August that would occur with the joint points of diversion in effect would also have occurred under the conditions in effect before implementation of the 1995 Bay-Delta Plan. The Board also noted that "salinity generally is improved as a result of implementing the 1995 Bay-Delta Plan." With one minor exception, which the Board found "so slight as to be within modeling error," the Board determined that any worsening in conditions would not be the result of the joint points of diversion.

Based on the foregoing conclusions, the Board inserted terms and conditions in the Bureau's CVP permits (except for the permits for New Melones and Friant) allowing the Bureau to divert or redivert water at the SWP's Banks Pumping Plant "only if a response plan to ensure that water levels in the southern Delta will not be lowered to the injury of water users in the southern Delta has been approved by the Executive Director of the [Board]. [The Bureau] shall prepare the response plan with input from the designated representative of the South Delta Water Agency." The new terms and conditions also required the Bureau to "develop a response plan to ensure that the water quality in the southern and central Delta will not be significantly degraded through operations of the Joint Points of Diversion to the injury of water users in the southern and Central Delta. Such a plan shall be prepared with input from the designated representative of the Contra Costa Water District and approved by

the Chief, Division of Water Rights." (Decision 1641, pp. 150-151.)

The Board further authorized the Bureau to use the SWP's Banks Pumping Plant in three stages. In stage 1, the Bureau was authorized to divert or redivert water at the Banks Pumping Plant to serve a limited number of contractors, to support a recirculation study, and to recover export reductions taken to benefit fish. In stage 2, the Bureau was authorized to use the Banks Pumping Plant for any purpose authorized under its permits, subject to the development of an operations plan, to be approved by the Board's executive director, "to protect fish and wildlife and other legal users of water." A similar limitation applied to stage 3. In addition, the Bureau was required to "protect water levels in the southern Delta through measures to maintain water levels at elevations adequate for diversion of water for agricultural uses. This requirement can be satisfied through construction and operation of three permanent tidal barriers in the southern Delta or through other measures that protect water quality in the southern and central Delta and protect water levels at elevations adequate to maintain agricultural diversions." (Decision 1641, p. 153.)

In authorizing the Department to use the CVP's Tracy Pumping Plant, the Board inserted terms and conditions in the Department's SWP permits essentially identical to those set forth above.

In the first cause of action in their non-CEQA writ petition, the Central Delta parties alleged use of the joint points of diversion would injure legal users of water as a result of lowered water levels and increased salinity. The trial court rejected these allegations.

On appeal, the Central Delta parties press both of these points again. On the salinity issue, they contend "[t]he modeling results for the [joint points of diversion] clearly

show numerous instances where there will be substantial water quality violations at the various measuring points in the Delta." What the Central Delta parties *fail* to address, however, is the Board's finding that these "violations" are "due to implementation of the 1995 Bay-Delta Plan or due to restrictions on New Melones Reservoir releases for salinity control . . . , *not* due to [the joint points of diversion]." (Decision 1641, p. 108, italics added.) In other words, the Board found that any increased salinity in the southern Delta would not be caused by the joint points of diversion. Because the Central Delta parties have not shown otherwise, we must presume this finding is supported by substantial evidence in the record. Accordingly, the Board was justified in concluding the joint points of diversion would "not operate to the injury of any legal user of the water involved" by increasing the salinity of water in the southern Delta. (§ 1702.)

As for the issue of water levels, the Central Delta parties' complaint is that the Board "simply deferred" deciding whether the joint points of diversion would operate to the injury of agricultural users in the southern Delta by lowering water levels. According to them, "Under Water Code section 1702, it was the [Board's] obligation to determine if the proposed permit changes . . . would cause harm to other legal users. The Board simply deferred this determination hoping that later proposals or actions developed *after* the hearings would prevent the expected harm. Not knowing when or under what conditions [use of the joint points of diversion] will occur, the [Board] had no basis on which to find there would be no harm to other legal users."

We are not persuaded. Under subdivision (a) of section 1704, the Board is authorized to *conditionally* approve a petition for changes in a permit to appropriate water. That is what the Board did here. Essentially, the Board determined that approving the joint points of diversion petition unconditionally might injure agricultural users in the southern Delta

because increased pumping resulting from the use of the joint points of diversion might lower water levels to a point where water could not be diverted for agricultural uses in the Delta. To avoid this result, the Board required the Bureau and the Department, before any use of the joint points of diversion, to prepare an operations plan, in consultation with South Delta Water Agency and to be approved by the Board's executive director, "to ensure that water levels in the southern Delta will not be lowered to the injury of water users in the southern Delta." The Board further required that in stages 2 and 3 of the operation of the joint points of diversion, the Bureau and the Department develop an operations plan, to be approved by the Board's executive director, "to protect fish and wildlife and other legal users of water." (Decision 1641, pp. 150, 152.)

Certainly the Board had the power to approve the joint points of diversion petition on the condition that the Bureau and the Department ensure that operations of the joint points of diversion would not lower water levels in the southern Delta to a point where agricultural users could not divert water for their agricultural use. For all intents and purposes, that is what the Board did by requiring the Bureau and the Department to prepare response plans and operations plans for approval by the Board's executive director. Not only do the terms and conditions the Board imposed properly *Seek* to ensure that agricultural users will not be injured by lower water levels as a result of the joint points of diversion, they have the added benefit of keeping the Board involved in the development of the operational plans of the Bureau and the Department that are the means of ensuring that result.

This is not a case-like *Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 20 Cal.Rptr.3d 898-where the Board has wrongfully delegated its authority to its staff. In that case, the Board approved applications to appropriate water that did not "set forth the

actual uses or uses [to be made] of the impounded waters." *(Id.* at p. 261, 20 Cal.Rptr.3d 898.) This court concluded that the Board "may not delegate the authority to determine the merits of an application to appropriate water, except as provided by statute." (*Ibid.*)

Here, the Board did not improperly delegate its responsibility for determining that the approval of the joint points of diversion petition would not operate to the injury of any legal user of the water involved. Instead, the Board determined there would *be* no injury as long as the Bureau and the Department ensure that their operations of the joint points of diversion do not cause water levels in the southern Delta to recede to a point where agricultural users cannot divert water for their agricultural use. Requiring the Bureau and the Department to provide this assurance through response plans and operations plans approved by the Board's executive director was a valid condition on approval under section 1704 and not an unlawful delegation of the Board's authority.

For the foregoing reasons, the trial court properly rejected the first cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502) to the extent the Central Delta parties challenged the Board's approval of the joint points of diversion petition.

One issue relating to the joint points of diversion petition remains to be addressed. In their opening brief, the Audubon Society parties complain that Decision 1641 "fails to adopt any specific mitigation measures that would assure" that adverse impacts to fish and wildlife from increased rates of pumping under the joint points of diversion "are avoided." According to them, the Board's deferral "of an appropriate mitigation measure to a future 'operations plan' . . . abdicates the . . . Board's statutory responsibility to address this problem now."

The Audubon Society parties fail to identify the source of the "statutory responsibility" they contend the Board abdicated. In any event, whatever the source of that responsibility, we conclude that in conditioning its approval of the joint points of diversion petition on the submission and approval of operations plans "to protect fish and wildlife," the Board acted properly. Accordingly, the Audubon Society parties' challenge to the Board's approval of the joint points of diversion petition is without merit.

IV

Challenges To The Implementation EIR

A

Challenges Relating To The Joint Points Of Diversion

In January 2000, the Central Delta parties filed a petition for writ of mandate challenging the Board's certification of the implementation EIR (the CEQA writ petition). (*Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 309539).) In their first cause of action, the Central Delta parties alleged (among other things) that the Board "failed to prepare and [*sic*] adequate EIR by not examining the effects associated with the source and amount of water used for increase[s] in export pumping approved under the joint point operations." In the second cause of action in their writ petition, the Audubon Society parties included an identical allegation.

In their brief in the trial court, the Central Delta parties framed their CEQA arguments relating to the joint points of diversion petition differently. They first asserted that the implementation EIR "unlawfully and unacceptably failed to even mention, much less investigate, discuss and analyze the [joint points of diversion]'s potential impacts on the water quantity and quality in the San Joaquin River." They also asserted that the implementation EIR unlawfully deferred and

delegated the formulation of mitigation measures to protect water users and the environment in the central and southern Delta from the effects of the joint points of diversion.

As previously noted, the Audubon Society parties did not file their own brief in the trial court but did join in the Central Delta parties' brief.

In response to the foregoing challenges by the Central Delta parties, the trial court found "no error."

On appeal, the Central Delta parties press both points again. The Audubon Society parties join in these arguments.[50] We will address each argument in turn. First, however, we set forth the basic legal principles governing EIR's.

As this court explained in *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106, 11 Cal.Rptr.3d 104: "'An environmental impact report is an informational document,' the purpose of which 'is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; . . . .' (CEQA, § 21061.) 'The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.' (CEQA, § 21002. 1, subd. (a).) 'The EIR has been repeatedly recognized as the """heart of CEQA."""' "(*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 107, 126 Cal. Rptr.2d 441.)"

"The EIR shall focus on the significant effects on the environment. The significant effects should be discussed with

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[50] Because the arguments made by the Audubon Society parties add nothing to the arguments made by the Central Delta parties, the discussion that follows focuses on the latter.

emphasis in proportion to their severity and probability of occurrence." (Cal.Code Regs., tit. 14, § 15143 (Guidelines).) "An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible." (*Id.*, § 15151.) "The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR." (*Id.*, § 15146.)

1. *Impact Of The Joint Points Of Diversion On Water Quality*

The Central Delta parties first assert that the implementation EIR fails to adequately discuss the impact of the joint points of diversion on water quality in the San Joaquin River. They contend that because use of the joint points of diversion "affords the capability to substantially increase CVP exports from the Delta," the Board was obligated to consider where those increased exports might be delivered and what effect that delivery might have on salinity levels in the San Joaquin River. In particular, the Central Delta parties' concerns relate to the potential increase in exports to the west side of the San Joaquin Valley under the joint points of diversion, because of the saline discharge back into the San Joaquin River from the irrigation of those lands. The Audubon Society parties make similar arguments.

The final implementation EIR considered nine different alternatives relating to the joint points of diversion petition. Alternative 1 was the "base case" or "no project" alternative, under which the water quality objectives from Decision 1485 would remain in effect and the Bur[illegible]would be authorized to use the SWP's pumping plant only to make up export deficiencies in May and June caused by export restrictions.

Alternative 2 assumed the water quality objectives from the 1995 Bay-Delta Plan would be in effect and *no* use of joint points of diversion would be authorized. The remaining alternatives assumed various levels of operation of the joint points of diversion.

The final implementation EIR devotes 33 pages to the analysis of salinity levels within the Delta under the various alternatives. This includes a discussion of salinity levels at various points on the San Joaquin River, including Vernalis. Accordingly, the Central Delta parties' assertion that the EIR does not discuss the impact of the joint points of diversion on water quality in the San Joaquin River is baseless.

Faced with this fact, the Central Delta parties argue the implementation EIR is inadequate because "there is absolutely no discussion or even mention of potential drainage impacts on the San Joaquin River from [use of the joint points of diversion]." In other words, according to the Central Delta parties, while the implementation EIR discusses salinity levels under the various joint points of diversion alternatives, it does not specifically discuss the extent to which those levels are affected by drainage back into the San Joaquin River of water exported from the Delta to the west side of the San Joaquin Valley.

The Central Delta parties raised this issue before the Board when, in a comment on the draft implementation EIR, they asserted: "It is not clear whether or not the impacts of the increased amounts of salts delivered with the increased CVP deliveries to the west side of the San Joaquin Valley is accounted for in the models." In response to that comment, the Board included the following explanation in the final implementation EIR: "The use of joint points of diversion will not increase salt load discharges to the San Joaquin River in comparison to JPOD [joint points of division] Alternative 1. In comparison to JPOD Alternative 2, salt loads will increase. This increase is reflected in the model studies by

increased return flows from the west side of the San Joaquin Valley. The increased flows, however, result in a decreased modeled salt concentration in the San Joaquin River at Maze Road because the salt concentration at this location is modeled using a salinity/flow relationship. In any event, the change in salt levels due to the use of the joint points of diversion [is] expected to be insignificant because the change in return flows is very small."

Belatedly acknowledging this response in their reply brief, the Central Delta parties contend it is inadequate because it omits details. Challenging the first sentence-in which the Board stated that "[t]he use of joint points of diversion will not increase salt load discharges to the San Joaquin River in comparison to JPOD Alternative 1"-the Central Delta parties contend that "[i]n order to enable the public and the decision makers to make 'an independent, reasoned judgment' of the validity of that conclusion, the public and the decision makers would, at a minimum, need a good faith disclosure of what factors and assumptions the EIR preparers took into consideration in arriving at that conclusion." They contend the EIR is inadequate because it fails to make any such disclosure.

We are not persuaded. In its analysis of the impacts of the various joint points of diversion alternatives on the delivery of CVP water, the implementation EIR shows that, with the exception of one alternative, all of the joint points of diversion alternatives would result in *decreased* CVP water deliveries compared to existing conditions-that is, alternative 1. Obviously, decreased water exports compared to existing conditions "will not increase salt load discharges to the San Joaquin River." No further explanation was necessary regarding these alternatives.

As for the one alternative (alternative 8) that would result in increased CVP water deliveries compared to existing conditions, the sufficiency of the EIR is best analyzed in conjunction with the challenge of the Central Delta parties to

the remainder of the Board's response to their comment. In the remainder of its response, the Board essentially explained that compared to alternative 2-under which *no* use of joint points of diversion would be authorized-the seven alternatives for operation of the joint points of diversion would result in "increased return flows from the west side of the San Joaquin Valley," which in turn would result in increased salt load discharges to the San Joaquin River (with the exception of one location); however, the increase was expected to be "insignificant because the change in return flows is very small."

The Central Delta parties complain that the Board's statement about the size of the change in return flows is not supported by an adequate explanation or by substantial evidence. As they point out, "The EIR must contain facts and analysis, not just the bare conclusions of a public agency." *(Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831, 173 Cal.Rptr. 602.) Upon further examination, however, the final implementation EIR does contain an adequate explanation for and substantial evidence to support the Board's determination that the change in return flows under the seven alternatives for operation of the joint points of diversion would be small compared to no use of the joint points of diversion.

According to the final implementation EIR, alternatives 3 through 9 for operation of the joint points of diversion alternatives would, on average, result in increased annual CVP water deliveries ranging from 45,000 acre-feet (alternative 9) to 247,000 acre-feet (alternative 8) when compared with no use of the joint points of diversion (alternative 2). Given that CVP deliveries under alternative 2 amount to 2,591,000 acre-feet per year, this means the seven joint points of diversion alternatives would result in approximate increases in CVP deliveries ranging from 1.7 to 9.5 percent over alternative 2.

Similarly, alternative 8 would result in increased CVP water deliveries of 68,000 acre-feet annually when compared with existing conditions (alternative 1). Given existing CVP deliveries of 2,770,000 acre-feet per year, this means alternative 8 would result in a delivery increase of approximately 2.5 percent.

Assuming increased CVP deliveries were allocated equally to all users, including the agricultural users on the west side of the San Joaquin Valley, the Board reasonably could have concluded that increases in CVP deliveries of less than 10 percent would not result in significant changes to the return flows to the San Joaquin River and therefore would not result in a significant increase in salt levels in the river. Thus, there is an adequate basis for the conclusion the Central Delta parties challenge.

It should be noted, however, that agricultural users on the west side of the San Joaquin Valley would not necessarily receive a proportionate share of any increased deliveries, so the return flows would not necessarily increase proportionally. The hydrological model the Board used to analyze the various alternatives for the joint points of diversion assumes an annual demand for CVP exports totaling 3,573,000 acre-feet, approximately 35 percent of which-1,260,000 acre-feet-is attributed to the San Luis unit of the CVP, which is the part of the CVP that supplies the west side of the San Joaquin Valley. Even under the joint points of diversion alternative with the greatest increase in CVP water deliveries (alternative 8), however, a total of only 2,838,000 acre-feet of water would be delivered annually, which is less than 80 percent of the total demand. This is significant because the lack of water to meet export demands falls heaviest on agricultural users. As the implementation EIR explains, "CVP South-of-Delta deficiencies are imposed when needed by contract priority," with agricultural users having the lowest priority. Indeed,

supplies for agricultural users are reduced up to 50 percent before deficiencies are allocated to any other users.

What this means is that the deficiency in water for export, even under the joint points of diversion alternative that would provide the greatest increase in CVP water deliveries (alternative 8), would fall heaviest on agricultural uses, such as the use of CVP water from the San Luis unit to irrigate farm lands on the west side of the San Joaquin Valley. Thus, increased deliveries to that area would probably be less than the overall increase of between 1.7 and 9.5 percent.

We conclude the foregoing information is sufficient to support and explain the Board's conclusion that the change in salt levels in the San Joaquin River due to the use of the joint points of diversion would be insignificant because the change in return flows from the saline lands on the west side of the San Joaquin Valley would be very small. The challenge to the implementation EIR on this basis by the Central Delta parties fails.

2. *Mitigation Of Impacts On Water Levels And Fish And Wildlife*

The Central Delta parties' next challenge to the implementation EIR is that the Board "mishandl[ed] its CEQA obligation with respect to describing, evaluating and ultimately adopting feasible mitigation measures to 'mitigate or avoid'" impacts of the joint points of diversion on water levels in the vicinity of the SWP and CVP pumps, as well as impacts on fish and wildlife. The Audubon Society parties echo this challenge.

This challenge is related to the argument we addressed (and rejected) above that the Board improperly deferred and delegated deciding whether the joint points of diversion would operate to the injury of agricultural users in the southern Delta by lowering water levels. The focus here, however, is not on what the Board ultimately decided to do in

Decision 1641, but on the sufficiency of the implementation EIR as an informational document. To the extent the Central Delta parties challenge the Board's ultimate decision under the guise of challenging the EIR, we reject those challenges as misplaced. The only issue we are concerned with here is the adequacy of the EIR on the mitigation issue.

As this court explained in *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027, 280 Cal. Rptr. 478:

> "Public Resources Code section 21002 requires agencies to adopt feasible mitigation measures to substantially lessen or avoid otherwise significant adverse environmental impacts.
>
> "[¶] . . . [¶]
>
> "For each significant effect, the EIR must identify specific mitigation measures; where several potential mitigation measures are available, each should be discussed separately, and the reasons for choosing one over the others should be stated."

This court continued, "'[I]n situations in which the formulation of precise means of mitigating impacts is truly infeasible or impractical at the time of project approval . . . , the approving agency should commit itself to eventually working out such measures as can be feasibly devised, but should treat the impacts in question as being significant at the time of project approval. Alternatively, for kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process . . . , the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant

impacts will in fact be mitigated.'" (*Sacramento Old City Assn. v. City Council, supra*, 229 Cal.App.3d at pp. 1028-1029, 280 Cal.Rptr. 478.)

The Central Delta parties complain that the implementation EIR does not satisfy the foregoing requirements with respect to mitigation of impacts of the joint points of diversion on water levels and fish and wildlife. In analyzing those complaints, it is important to do something the Central Delta parties fail to do-focus on the EIR. We begin with the water level issue.

The final implementation EIR identifies only one significant impact on water levels in the Delta resulting from the various joint points of diversion alternatives. Specifically, the EIR notes that at a location on the Grant Line Canal, downstream (west) of the proposed Grant Line Canal barrier, alternatives 7 and 8 would cause the average minimum water level in June, July, and August to be one-half foot to one foot lower than under existing conditions. The EIR acknowledges that this reduced water level could "have an adverse effect on water diversion downstream of the Grant Line barrier." Because the problem results from the barrier, the EIR recommends moving the barrier as far as feasible to the west end of the canal.

The Central Delta parties' ostensible challenge to the EIR relating to the water level issue fails to address the foregoing discussion in the EIR. Instead, the Central Delta parties complain about Decision 1641, asserting that by providing for a "response plan" to be prepared in the future by the Bureau or the Department before any operation of the joint points of diversion, the Board improperly "deferred and delegated the identification, evaluation, and ultimate adoption of mitigation measures." What the Board ultimately decided to do in Decision 1641, however, is not determinative of the adequacy of the implementation EIR. To successfully challenge the EIR, the Central Delta parties need to show that *the EIR* does

not adequately address specific mitigation measures for the significant environmental impacts of the project-here, the impact on water levels in the Delta. They cannot make that showing if they ignore the EIR, as they have here.

The next issue is mitigation of impacts of the joint points of diversion on fish and wildlife. The final implementation EIR observes that "[i]n general, . . . Alternatives 2 through 9 are predicted to have slight beneficial effects on through-Delta survival of juvenile chinook salmon and steelhead, and on abundance of delta smelt, Sacramento splittail, starry flounder, longfin smelt, and *Crangon franciscorum*, compared to the D-1485 based case (Alternative 1). In addition, for most of these species, no significant adverse effects were predicted for [Alternatives 3 through 9] compared to Alternative 2." The EIR further observes: "Alternatives 7 and 8 are predicted to have slight adverse impacts on young-of-the-year striped bass abundance compared to the base cases (Alternatives 1 and 2). Potential impacts on striped bass under . . . Alternatives 7 and 8 could be mitigated through funding of additional stocking."

In ostensibly challenging the EIR's discussion of mitigation of impacts of the joint points of diversion on fish and wildlife, the Central Delta parties again fail to address the discussion *in the EIR*. Instead, as with the water level issue, they complain about what the Board did in Decision 1641. As we have explained, however, the Central Delta parties cannot show the EIR is inadequate if they ignore it, which they do. Accordingly, the challenge of the Central Delta parties to the implementation EIR based on its discussion of mitigation for impacts of the joint points of diversion on fish and wildlife fails.

B

Challenges Relating To The San Joaquin River Agreement

In the first cause of action in their CEQA writ petition, the Central Delta parties also alleged that the Board failed to prepare an adequate EIR by "not examining the environmental effects resulting from the reduction in return flows and accretions to surface streams and groundwater/surface water exchanges both in the base case and in the alternatives" and "not examining the environmental effects resulting from shifts in hydro power releases both in the base case and in the alternatives." In the second cause of action in their writ petition, the Audubon Society parties offered identical allegations.

In their brief in the trial court, the Central Delta parties fleshed out their allegations, explaining that they related to the impacts of the San Joaquin River Agreement on return flows in the San Joaquin River system and hydropower releases to that system. As previously noted, the Audubon Society parties offered no independent argument of their own, but joined the Central Delta parties' trial court brief. The trial court rejected these challenges to the implementation EIR as without merit.

On appeal, the Central Delta parties renew their arguments, asserting that the implementation EIR was insufficient because it did not include: "(1) an investigation, discussion, and analysis of the [San Joaquin River Agreement]'s impacts on surface and subsurface 'return flows' within the affected river systems; and (2) an investigation and description of the affected reservoirs' historic and current release schedules and an analysis of how those release schedules would be affected by the [San Joaquin River Agreement]." The Audubon Society parties offer similar arguments.

1. *Exhaustion OfAdministrative Remedies*

The Board first contends that the Central Delta and Audubon Society parties failed to exhaust their administrative remedies regarding these complaints. The Board asserts that the Audubon Society parties "did not participate in the administrative hearing conducted by the . . . Board, and failed to provide a single comment on the EIRs." The Board further asserts that "the comments submitted on the EIRs by the *Central Delta* parties . . . are wholly inadequate to exhaust their administrative remedies" regarding their complaints about the San Joaquin River Agreement.

"Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199, 22 Cal.Rptr.3d 203.) Subdivision (a) of CEQA section 21177 sets forth the exhaustion requirement on which the Board relies here.[51] THAT REQUIREMENT IS satisfied if "the alleged grounds for noncompliance with [CEQA] were presented . . . by any person during the public comment period provided by [CEQA] *or* prior to the close of the public hearing on the project before the issuance of the notice of determination." (CEQA, § 21177, subd (a), italics added.) Thus, in challenging the certification of the implementation EIR, the Central Delta and Audubon Society

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[51] There is a second exhaustion requirement in subdivision (b) of CEQA section 21177, which provides that "[n]o person shall maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment period provided by [CEQA] or prior to the close of the public hearing on the project before the issuance of the notice of determination." Although the Board contends the Audubon Society parties "did not participate in the administrative hearing conducted by the . . . Board," the Board does not rely on the exhaustion requirement in subdivision (b) of section 21177, and therefore we do not address whether the Audubon Society parties satisfied that requirement.

parties are not limited to grounds for noncompliance they themselves presented to the Board, nor are they limited to comments submitted to the Board during the public comment period on the draft implementation EIR. As long as the alleged grounds for noncompliance were presented by *someone* at *sometime* prior to the close of the public hearing, then the exhaustion requirement is satisfied.

The Audubon Society parties contend it is too late for the Board to argue that they failed to exhaust their administrative remedies because the Board "failed to press [this issue] during the trial court proceedings" by "fil[ing] a demurrer, motion to dismiss, or motion for summary judgment alleging [the Audubon Society parties'] failure to exhaust [their] administrative remedies." We disagree. In its opposition brief in the trial court, the Board asserted that the Central Delta parties had failed to exhaust their administrative remedies with respect to "the alleged failure [of the implementation EIR] to analyze impacts of the [San Joaquin River Agreement] on surface/subsurface flows and hydropower." Although the Board did not direct a similar argument to the Audubon Society parties specifically, this is understandable because the Audubon Society parties did not file their own brief to argue the CEQA issues alleged in their petition; instead, as we have previously noted, they simply joined in the brief filed by the Central Delta parties. Under these circumstances, we conclude the Board adequately raised the exhaustion issue in the trial court as to both the Central Delta and Audubon Society parties.

Furthermore, contrary to the Audubon Society parties' argument, the Board was not required to "appeal from the trial court's failure to address" the exhaustion issue in order to pursue that issue on appeal. It is true that in rejecting the CEQA arguments related to the San Joaquin River Agreement as without merit, the trial court implicitly rejected the Board's argument that the Central Delta parties failed to exhaust their

administrative remedies with respect to those arguments. But because the trial court's ultimate decision to reject those arguments was in the Board's favor, the Board was not *aggrieved* by that decision and therefore had no right to challenge it on appeal. (*See County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737, 97 Cal.Rptr. 385, 488 P.2d 953.) It was only after the Central Delta and Audubon Society parties appealed the trial court's decision that the Board had occasion to raise the exhaustion issue again, this time as an alternative basis for upholding the trial court's decision. Accordingly, the exhaustion issue is properly before us.

To decide whether the Central Delta and Audubon Society parties exhausted their administrative remedies, we must first determine the true character of their challenges to the EIR relating to the San Joaquin River Agreement. Assuming they did exhaust their administrative remedies, we can then consider the validity of their challenges. We will begin with the challenge relating to return flows.

2. *Return Flows*

On the return flow issue, the Central Delta and Audubon Society parties contend that the implementation EIR failed to adequately discuss the effect of the San Joaquin River Agreement on return flows to the San Joaquin River. According to them, under the agreement the irrigation districts could redirect up to 137,500 acre-feet of water annually from existing irrigation use to provide instream flows, and this redirection could have a substantial impact on the timing and amount of water flowing back into the San Joaquin River system, both on the surface and below the surface, which in turn could have a substantial impact on the quantity and quality of the water in that river system. They contend the implementation EIR did not adequately analyze this potential impact. (*See* Guidelines, § 15125, subd. (c) ["The EIR must demonstrate that the significant environmental impacts of

the proposed project were adequately investigated and discussed"].)

To further understand this challenge, it is necessary to examine the content of the EIR relating to the San Joaquin River Agreement and what happened during phase 2B of the public hearing.

The implementation EIR considered two alternatives involving performance of the San Joaquin River Agreement: one based on the assumption that "combined use of SWP and CVP points of diversion in the Delta is authorized" ("Joint POD Alternative 9") and one based on the assumption that the joint points of diversion were not authorized ("flow alternative 8"). As to each alternative, the EIR discussed the potential impacts on water supply, as well as on hydrology and salinity in the Delta. The EIR also discussed the potential impacts of Joint POD alternative 9 on water levels in the Delta.

The Board conducted phase 2B of the hearing for the express purpose of receiving evidence on the long-term change petitions by the irrigation districts that had to be granted to allow performance of the San Joaquin River Agreement. During phase 2B, attorneys for the Central Delta parties elicited testimony from Dan Steiner, the individual who modeled the hydrological effects of the San Joaquin River Agreement, that in conducting his modeling, he simply assumed there would be no changes in return flows as a result of the long-term changes to the irrigation districts' licenses. In their phase 2B closing argument, the Central Delta parties specifically pointed out that the irrigation districts had admitted "that their modeling does not address the impacts on return flows and accretions to the river and that they have made no analysis of such impacts."

It is this argument the Central Delta parties now pursue on appeal as a challenge to the implementation EIR. In essence,

the complaint of the Central Delta parties is that the EIR's discussion of the potential impacts of the San Joaquin River Agreement on water supply, hydrology, salinity, and water levels in the Delta failed to account for changes in return flow as a result of performance of the agreement, because the modeling on which the EIR was based did not take such changes into account. Thus, the Central Delta parties are actually challenging the validity of the modeling study on which the EIR was based.

The question is whether this alleged ground for noncompliance with CEQA was adequately presented to the Board before the close of the public hearing. We conclude it was.

"The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.] The decisionmaking body ""is entitled to learn the contentions of interested parties before litigation is instituted. If [plaintiffs] have previously sought administrative relief... the Board will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so."""" (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342,384, 110 Cal.Rptr.2d 579.)

The Central Delta parties point out that in the written briefing they submitted to the Board in August and September 1999, including their closing argument on phase 2B, they "discussed extensively" the Board's "failure to address the [San Joaquin River Agreement's] impacts on return flows." They also contend they exhausted their administrative remedies on the return flow issue through their "extensive cross-examination of witnesses" during the public hearing.

We agree. Although the Central Delta parties did not use the magic words "the EIR is inadequate," they did bring to the Board's attention their position that the record before the

Board did not contain an adequate analysis of the potential impact of the San Joaquin River Agreement on return flows. Under these circumstances, we believe the Board was given an adequate opportunity to address any deficiency in the implementation EIR regarding the return flow issue. Accordingly, the Central Delta parties adequately exhausted their administrative remedies on this issue.

We turn now to the substance of their complaint. As we have noted, the Central Delta parties essentially challenge the validity of the modeling on which the implementation EIR was based. When a challenge is brought to studies on which an EIR is based, "the issue is not whether the studies are irrefutable or whether they could have been better. The relevant issue is only whether the studies are sufficiently credible to be considered as part of the total evidence that supports the" agency's decision. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409, 253 Cal.Rptr. 426, 764 P.2d 278.) "A clearly inadequate or unsupported study is entitled to no judicial deference." (*Id.* at p. 409, fn. 12, 253 Cal.Rptr. 426, 764 P.2d 278.) The party challenging the EIR, however, bears the burden of demonstrating that the studies on which the EIR is based "are clearly inadequate or unsupported." (*Ibid.*)

The Central Delta parties have not met that burden here. In responding to cross-examination by the Central Delta parties, Steiner testified that his modeling assumed no effect on return flow "[b]ecause [he] had nothing to lead [him] to believe there was" (or would be) such an effect. Steiner further testified that he discussed his assumption "with each of the operating agencies" (i.e., the irrigation districts) and they told him to "go with the assumption that had been historically assumed, which is no change."

Also in the record is a copy of an EIR prepared by the Bureau and the San Joaquin River Group Authority regarding the San Joaquin River Agreement. In commenting on the

draft of that EIR, the Central Delta parties offered the same argument they now advance here: that the EIR did not adequately assess the potential reduction in return flows as a result of performance of the San Joaquin River Agreement. The response to those comments included these statements:

> "The participants who are providing flows for the proposed action have stated that the majority, if not all of the flow provided would not affect the flow leaving their respective systems via surface returns. . . . The proponents do not anticipate the occurrence of reduced summer-time return flows as a result of the proposed action; . . ."

From the foregoing evidence, it appears the irrigation districts anticipated there would be little, if any, change in return flows as a result of their performance of the San Joaquin River Agreement. This was a sufficient basis for Steiner to exclude any such change from his modeling study. The Central Delta and Audubon Society parties have pointed to no evidence in the record contradicting this evidence or anything else to suggest the decision not to include a change in return flows in the modeling was unreasonable. Accordingly, they have failed to show that the modeling on which the implementation EIR was based was "clearly inadequate or unsupported" (*Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 409, fn. 12, 253 Cal.Rptr. 426, 764 P.2d 278), and thus their challenge to the EIR based on the return flow issue fails.

3. *Hydropower*

The Central Delta and Audubon Society parties' challenge to the implementation EIR based on the hydropower issue is that the EIR failed to analyze how the San Joaquin River Agreement would affect hydropower release schedules for reservoirs affected by the agreement. In essence, they complain that "[w]ithout knowing where the water will come

from [for the irrigation districts to supply to meet their obligations under the San Joaquin River Agreement] it is essentially impossible to meaningfully evaluate and compare the impacts to the river systems with and without the [agreement]."

In a comment on the draft EIR, South Delta Water Agency (one of the Central Delta parties) raised this issue when it asserted the following: "It is impossible to model the [San Joaquin River Agreement], or indeed any Alternative unless one knows the source of the flows to be provided. The results of any modeling will change depending on whether the water provided is from a decrease in consumption, a rescheduled power generation release, or recaptured return flow. Even if the technical appendices contain such assumptions (we do not find any such) the actual effects will change unless the source of the water is mandated." Accordingly, the Central Delta parties exhausted their administrative remedies on this challenge to the implementation EIR.

Turning to the merits of the challenge, the Board offered the following response to the comment by South Delta Water Agency: "Reasonable assumptions are made regarding the source of water from individual water right holders under each of the alternatives. The EIR assumes for flow Alternatives 3, 4, and 5 the water provided to meet Bay/Delta obligations comes first from reservoir re-operation and then, to the extent necessary, from diversion reduction. Alternative 6 assumes water comes from the Delta via releases from the Delta-Mendota Canal. Alternatives 7 and 8 assume that water comes from reservoir re-operation for Merced [Irrigation District] and [Modesto Irrigation District]/[Turlock Irrigation District], and from returns to the system of diverted water for [Oakdale Irrigation District], [South San Joaquin Irrigation District], and the Exchange Contractors. The commenter is correct that an individual water user, especially a reservoir operator, has flexibility in incorporating a new demand into

its operation, but it is not feasible to analyze all possible operational decisions available to the water user."

As we have noted, "the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible." (Guidelines, § 15151.) Furthermore, as the Central Delta parties themselves point out, "an agency must use its best efforts to find out and disclose all that it reasonably can." (*Id.*, § 15144.)

The key word in section 15144 of the Guidelines is "reasonably." That section also acknowledges the commonsense proposition that "foreseeing the unforeseeable is not possible." (Guidelines, § 15144.) Here, the Board explained the assumptions of the water sources the irrigation districts would use on which the Board based its analysis of potential impacts of the San Joaquin River Agreement and further explained that, because the agreement gave the districts flexibility in determining where to come up with the water, "it is not feasible to analyze all possible operational decisions available to the" districts. The Central Delta and Audubon Society parties have failed to show that the Board's response on this issue was unreasonable under the circumstances. (Indeed, neither group of parties even mentions the Board's response.) Accordingly, their challenge to the EIR based on the hydropower issue fails as well.

In summary, we find no merit in the challenges of the Central Delta and Audubon Society parties to the implementation EIR. Accordingly, we will affirm the judgment in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 309539) to the extent it denied the Central Delta parties relief on their first cause of action and will affirm the judgment in *Golden Gate Audubon Society v. State Water Resources Control Board* (Super. Ct. Alameda County, 2003, No. 825585-9) to the extent it denied the Audubon Society parties relief on their second cause of action.

V

Challenges To The Change Petition

A

The Westlands Challenge To The Board's Purposes Of Use Determination

Westlands is a water district located on the west side of the San Joaquin Valley in Fresno and Kings Counties. By contract, Westlands is entitled to receive up to 1,150,000 acre-feet of CVP water from the Bureau annually to irrigate approximately 600,000 acres.

In response to the change petition, Westlands urged the Board to deny the Bureau's request to conform the purposes of use in its permits. Westlands asserted that under section 1702, "before the . . . Board can grant [the Bureau]'s petition, [the Bureau] must demonstrate and the . . . Board must find that the requested changes will not injure any person with a legally protectable right to use the water involved." Westlands further argued that "[i]t is beyond reasonable dispute that Westlands and other CVP contractors that receive [CVP] water . . . have an existing legally protectible right to use the water." According to Westlands, approval of the Bureau's request would injure Westlands and other CVP contractors because allowing the Bureau to use more CVP water for fish and wildlife enhancement would reduce the amount of water available for irrigation.

In Decision 1641, the Board posed the dispositive question as whether "CVP contractors [are] protected from changes in the amount of their contractual water supplies by Water Code section 1702." The Board answered that question in the negative. Essentially, the Board concluded that the Bureau holds the water rights to water appropriated under its permits, and the "no injury" rule of section 1702 does not protect those users of water "whose contractual entitlements are

dependent on the water rights of the water right holder." According to the Board, "Application of the 'no injury' rule is not the proper basis for determining contractual or other claims between a water service contractor and the water right holder who supplies water under contract where those claims are not based on the proprietary water rights of the water service contractor." Consequently, the Board approved the Bureau's request to conform the purposes of use in its permits. (Decision 1641, pp. 125, 129.)

In April 2000, Westlands filed a petition for writ of mandate *See*king to set aside the Board's approval of the change in 10 of the Bureau's CVP permits "to include fish and wildlife enhancement as a permitted purpose of use for water appropriated under said permits."[52] (*Westlands Water District v. State Water Resources Control Board* (Super.Ct. Sac.County, 2003, No. 00CS00603).) The *West-lands* case was one of the cases added to this coordinated proceeding in November 2000.

In addressing Westlands's petition, the trial court framed the initial question as whether Westlands and other contractors receiving CVP water "have standing as 'legal user[s] of the water involved' under section 1702, to challenge the Board's disposition of the Bureau['s] place of use petition." Determining that the term " 'legal user' is ambiguous on its

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[52] Westlands's writ petition listed 13 different permits, but only 10 of those permits were actually involved in the Bureau's request to conform the purposes of use. One of the remaining three permits (No. 13776), which relates to Black Butte Dam, was initially involved in the change of use request but was excluded from the request by amendment to the change petition in June 1995. The other two permits listed in Westlands's writ petition (Nos. 11886 and 11887) relate to Friant Dam and were *never* involved in the change of use request. It is not clear why Westlands did not seek to challenge the change in the other four Bureau permits that were involved in the change of use request, but we need not concern ourselves with that question because it has no bearing on our resolution of this appeal.

face in this water law context," the court examined the legislative history of section 1702 and concluded that "the [L]egislature, in using the concept of 'legal user,' did not intend to include those persons who use water provided under contract with a water supplier entity." Based on this conclusion, the court entered a judgment denying Westlands's writ petition. Westlands filed a timely notice of appeal from that judgment.

On appeal, Westlands frames the primary issue as "[w]hether Westlands and the landowners within Westlands are 'legal users of the water involved' in changes to the authorized purposes of use in the water rights permits applicable to the CVP." In our view, however, the dispositive issue in Westlands's appeal is properly framed more broadly: namely, whether the Board erred in approving the Bureau's request to add fish and wildlife enhancement as an authorized purpose of use in various of the Bureau's permits because the record showed the change in the permits would operate to the injury of a legal user of the water involved. For the reasons that follow, we conclude the answer to that question is "no."

In arguing over the meaning of section 1702, and whether that statute precluded the Board from approving the change in the purposes of use in the Bureau's permits, the parties have focused their attention on the phrase "legal user of the water involved" and whether that phrase encompasses CVP contractors like Westlands. Westlands contends that it and its constituent landowners are "legal users" who can claim injury under section 1702 based on the "ordinary, everyday" meaning of the phrase "legal user of the water involved." According to Westlands, "The phrase 'water involved' is straightforward; it means the water that is subject to the proposed change in the permit. 'User' is the person or entity putting that water to use. The qualifier 'legal' before user limits the scope to persons using the water legally."

The Board offers a different interpretation of the "legal user" language. In Decision 1641, the Board concluded that "a person or entity can use water legally without being a 'legal user of water' within the meaning of . . . section 1702." On appeal, the Board expounds on that conclusion by arguing that "the term 'legal user of water' . . . does not apply to federal contractors such as Westlands and, instead, only applies to holders of traditional water rights such as appropriative, riparian, or prescriptive rights." Thus, according to the Board, if a person holds a permit to appropriate water, that person is a "legal user" of the water he appropriates, but if that person contracts with another to allow the other person to use the water instead, the other person is not a "legal user" of the water because he has only a *contractual* right, rather than a "traditional water right," to use the water.

The initial problem with the Board's argument is that it ignores the first-and sometimes dispositive-step in statutory interpretation: giving the words of the statute their "plain meaning." "Because the statutory language is generally the most reliable indicator of th[e Legislature's] intent, we look first at the words themselves, giving them their usual and ordinary meaning and construing them in context. [Citation.] If the plain language of the statute is clear and unambiguous, our inquiry ends, and we need not embark on judicial construction. [Citations.] If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs." (*People v. Johnson* (2002) 28 Cal.4th 240, 244, 121 Cal.Rptr.2d 197, 47 P.3d 1064.)

The Board makes no effort to explain how its interpretation of the term "legal user of the water involved" as meaning a "traditional water rights holder," and excluding a person who lawfully uses water under a contract with a "traditional water rights holder," fits within the "plain meaning" of the simple words the Legislature used in the statute—"legal user of the

water involved." Instead, the Board disregards these rules and leaps past the statutory language into an examination of the legislative history of section 1702 to support its construction of the statute.

The Board points out that a review of the case law addressing the "no injury" rule before the advent of the Water Commission Act in 1914 "discloses that all of the cases involved claims of injury raised by traditional water right holders." From this observation, the Board suggests it follows that the "no injury" rule must have applied *only* to "traditional water right holders," and not to those "who do not hold water rights, but who, instead, take their water as contractors from water right holders."

We have a different explanation for the absence of case law the Board has noted. Before the enactment of the Water Commission Act, any party who had a complaint about a change in an established appropriation of water had to seek relief in court, because there was no administrative agency with jurisdiction over such disputes. As between two "traditional water rights holders"—whether appropriators, riparians, or prescriptive users-only the common law of water rights, or the Civil Code provisions regarding appropriations, would have provided a basis for one water right holder to *Seek* legal redress against another for a claimed "injury." As between an appropriator and a water user bound together by contract, however, the contract itself would have served as the basis for legal redress in a dispute between the parties. (*See*, e.g., *Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716, 730, 93 P. 858 [water appropriator sought to compel water user to pay market rate for water, rather than contract rate; court held that "the terms of the contract . . . constitute the measure of the rights of the parties"].) Thus, prior to the advent of administrative control over water rights, there would have been no occasion for a person who had a contractual right to use water appropriated by another to

invoke the "no injury" rule in a dispute with the appropriator. This explains why the Board found no case law applying the "no injury" rule to a contractor's claim of injury before the advent of the Water Commission Act.

The question we must answer is whether, when the Legislature decided to give control over the administration of water rights to an administrative agency, it intended to allow only "traditional water rights holders" to claim the benefit of the "no injury" rule in the administrative setting, while leaving those who use water by contract with "traditional water rights holders" no choice but to pursue their contractual remedies in court.

As we have previously observed in connection with one of the challenges by the Central Delta parties to the Board's approval of the long-term change petitions of the irrigation districts to allow performance of the San Joaquin River Agreement, sections 16 and 39 of the Water Commission Act imported the "no injury" rule into the administrative setting. According to the Board, "Sections 16 and 39 of the [Water Commission] Act . . . confirm the view that the Legislature intended to apply the term 'legal user of water' to traditional water right holders and to no one else." We cannot agree. The Board points to no legislative history supporting such an interpretation, nor does it follow from the language used in the Water Commission Act.

The Board contends the term "user of water" was first introduced in section 12 of the Water Commission Act, and because the term in that context plainly refers to "an appropriative water right holder," the term "legal user" in section 16 must have been intended to apply only to "traditional water rights holders." Not so. The *complete* phrase used in section 12 is "any appropriator or user of water under an appropriation." (Stats.1913, ch. 586, § 12, p. 1018.) Given the complete phrase in the statute, there is absolutely no logic to the Board's assertion that the term "user of water" in section

12 refers to "an appropriative water right holder." Since the term "any appropriator" already describes the holder of a right to appropriate water, the term "user of water under an appropriation" must have been intended to refer to someone else. Indeed, a more thorough examination of section 12 confirms this conclusion.

As the Board points out, section 11 of the Water Commission Act declared that water that had been appropriated but had not been put to beneficial use with due diligence was to be treated as unappropriated water. (Stats.1913, ch. 586, § 11, pp. 1017-1018.) Section 12 then authorized the Water Commission to "prescribe the time in which the full amount of water appropriated shall be applied to a useful or beneficial purpose," "upon the application of any appropriator or user of water under an appropriation made and maintained according to law prior to the passage of this act." (Stats.1913, ch. 586, § 12, pp. 1018-1019.) Since the focus of section 12 is on the time allowed to put appropriated water to beneficial *use*, it made sense to allow a petition to determine the amount of time allowed to complete that purpose to be filed by the appropriator *or by the person using the water under the appropriation*—that is, the person who was ultimately responsible for putting the water to its beneficial use. By differentiating between the appropriator and the user of the appropriated water, section 12 recognized that the person appropriating the water might not be the person who actually used it-as in the case of an appropriator who provided water to a number of different users under contract. Indeed, one water law commentator in 1914 who was addressing the water titles of corporations, observed that, at that time, there was "a large proportion of irrigation by farmers who do not go to any stream for their water, but get it out the canal of some distributing system." (Wiel, *Water Titles of Corporations and Their Consumers* (1914) 2 Cal. L.Rev. 273.) Thus,

it appears the Legislature expressly recognized the existence of such contractual "users of water" in enacting the Water Commission Act.

This interpretation of section 12 of the Water Commission Act further undermines the Board's conclusion that "the Legislature intended to apply the term 'legal user of water' to traditional water right holders and to no one else." The fact that the term "user of water" in section 12 referred to a person who uses water under an appropriation but is not the appropriator tends to support the conclusion that the term "legal user of such water" in section 16 of the Water Commission Act encompassed such a person as well. Of course, the term "legal user" was broader still, since it encompassed not only persons who legally used water under an appropriation, but also riparians, those who had acquired their water rights by prescriptive use, and indeed anyone else who legally used the water involved. Unlike the Board, we find no indication in the Water Commission Act that the Legislature intended the broad term "legal user" to exclude those who lawfully use water under a contract with an appropriator.

It is important to remember, however, that the concept of "injury" embodied in the "no injury" rule is a narrow one. We have concluded already that the "no injury" rule in section 16 of the Water Commission Act was a codification of the common law rule that prohibited only those changes that would injure the *rights* of another water user. Accordingly, we must conclude that section 16 of the Water Commission Act allowed anyone who had a legal right to use water to oppose a change in the point of diversion of an appropriation on the ground the change would interfere with his or her legal right to use the water involved.

In a previous section of this opinion, we have explained the changes the Legislature made to the "no injury" statutes between the enactment of the Water Commission Act in 1914 and the enactment of the Water Code in 1943. None of those

changes reveals any intent by the Legislature to exclude from the broad term "legal user" parties who lawfully use water pursuant to a contract with the person who holds the permit to appropriate that water. Nor do we find any such intent in any other legislative enactment.

The Board argues that "in more modern times, the Legislature has amended the water right change provisions of the Water Code to affirm the . . . Board's 'water rights' reading of Section 1702." Under subdivision (c) of section 1703.6 (enacted in 2001) (Stats.2001, ch. 315, § 15), the Board may cancel a protest to a change petition that "is based on injury to a legal user of water . . . if the protestant fails to submit" certain information to the Board, including "[i]nformation that is reasonably necessary to determine if the protestant has a valid water right" and "[i]nformation concerning the protestant's historical, current, or proposed future diversion and use of water that is reasonably necessary to determine if the proposed change will result in injury to the protestant's exercise of its water right." (§ 1703.6, subd. (c)(2) & (3).) According to the Board, if it has "the authority to cancel a protest to a water right change application for failure to show a 'valid water right', then the possession of a 'valid water right' must be a necessary condition for an injury claim under Section 1702."

The first flaw in the Board's argument is that the Board offers no explanation of what the Legislature intended by the phrase "valid water right." The Board simply assumes that a "water right" for purposes of section 1703.6 must be the same as what the Board has referred to as a "traditional water right" and must exclude the *contractual* right to use water appropriated by another. The Board offers no basis for that assumption.

More importantly, however, the Board's argument reads too much into section 1703.6. Even if a "water right" for purposes of section 1703.6 must be, in the Board's parlance, a

"traditional water right," the statute does not authorize the Board to cancel a protest if the protestant fails to demonstrate that he has such a right. Instead, section 1703.6 authorizes the Board to cancel a protest if the protestant fails to submit information reasonably necessary to determine *if* it has a valid "water right" or to determine if the proposed change will result in injury to the protestant's exercise of its water rights. Section 1703.6 cannot be reasonably read as making possession of a "traditional water right" a requirement to protest a change petition and therefore this statute, enacted in 2001, casts no light on the meaning of section 1702, which has remained virtually unchanged since 1943, and which was expressly intended to retain the meaning of preexisting law dating back even further.

Reading section 1702 as applying the "no injury" rule to all "legal users of the water involved" in the change request, including those who lawfully use water under contract with the appropriator who *Seeks* the change, not only comports with the legislative history of the statute, but also properly recognizes the importance of *all* those who are ultimately responsible for putting water to beneficial use in California. California law has long recognized that the fundamental basis of a right to appropriate water is that the water must be put to beneficial use. Section 1240, which mirrors former Civil Code section 1411 and therefore embodies California law dating back to 1872, expressly provides that the right to appropriate water ceases when the appropriator ceases to use the water for a useful or beneficial purpose.

When a person obtains a permit to appropriate water for a specific beneficial purpose, and that purpose is to be accomplished by others who put the water to use under the terms of a contract with the permit holder, the persons who use the water are an integral part of the appropriator's right to take that water from its natural course in the first place. Without their beneficial use of the water, the appropriator would have

no right to take the water. If the permit holder *See*ks the Board's permission to change the purpose of use that provided the basis for the acquisition of its permit in the first place, there is no reason the persons who, through contracts with the permit holder, actually put the water to the beneficial use sought to be changed should be precluded from asserting to the Board that the change will operate to the injury of their rights, simply because those rights derive from a contract.[53]

At the same time, it must be emphasized that, as the Supreme Court explained almost 150 years ago, "in all cases the effect of the change upon the *rights* of others is the controlling consideration." (*Kidd v. Laird, supra*, 15 Cal. at pp. 180-181, italics added.) Thus, a person who claims injury from a change in the terms of a permit to appropriate water must show the change will interfere with his or her *right* to use the water, whatever the source of that right may be.

Accordingly, to show that the Board erred in approving the Bureau's request to change the purposes of use in its permits to include fish and wildlife enhancement, it is not enough for Westlands to show that the change will result in West-lands receiving less water. Westlands must show that it has a *right* under its contract with the Bureau to the greater amount of water and that the redirection of CVP water to fish and wildlife will interfere with that right. Westlands has not made that showing.

Before the Board, the Bureau asserted that changing the purposes of use in the Bureau's permits would "not deprive any CVP contractors of their respective contractual entitlements to CVP water." The Bureau pointed out that neither

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[53] In support of alternate bases for its argument that a CVP contractor can be a "legal user" of water under section 1702, Westlands has asked us to take judicial notice of two permits issued by the Board. That request is denied as moot because we do not reach the alternate bases for Westlands's argument.

West-lands nor any other CVP contractor is entitled to a fixed supply of CVP water every year. The Bureau specifically pointed to a provision in Westlands's contract (article 1 1a) which provides "for reduced annual water deliveries to [Westlands] for any cause, including situations in which [the Bureau] is required, by law, to make CVP water available for other purposes." In essence, the Bureau asserted that Westlands has no right under its contract to water that Congress has directed must be used for other purposes.

The Bureau's position is supported by the decision of the Ninth Circuit Court of Appeals in *O'Neill v. U.S.* (9th Cir.1995) 50 F.3d 677. *O'Neill* arose out of a reduction in the amount of water the Bureau provided to Westlands in 1993, following the enactment of the Central Valley Project Improvement Act. *(Id.* at p. 681.) When the Bureau announced that Westlands would receive only 50 percent of its contractual supply of water, Westlands sued to enforce a stipulated judgment which required the Bureau to perform its water service contract with Westlands. *(Ibid.)* The Bureau contended "that compliance with ESA [Endangered Species Act] and CVPIA required it to reduce the amount of water supplied to [Westlands] and that such a reduction was covered by the liability limitation in Article 11 of the contract." (*Id.* at pp. 681-682.)

On appeal from a district court's ruling in favor of the Bureau, the Ninth Circuit agreed with the district court that "the contract [between Westlands and the Bureau] does not obligate the government to furnish to Westlands the full contractual amount of water when that water cannot be delivered consistently with the requirements of the Endangered Species Act . . . and the Central Valley Project Improvement Act." (*O'Neill v. U.S., supra*, 50 F.3d at p. 680.) The appellate court also agreed with the district court that because "the contract was executed pursuant to the 1902 Reclamation Act and all acts amendatory or supplementary thereto," "[t]he contract

contemplates future changes in reclamation laws . . . and . . . limits the government's liability for shortages due to any causes." (*Id.* at p. 686.) The court went on to explain that the Central Valley Project Improvement Act "marks a shift in reclamation law modifying the priority of water uses," and "[t]here is nothing in the contract that precludes such a shift." (*Ibid.*)

The interpretation of Westlands's water service contract in *O'Neill* is dispositive here. The reason the Bureau sought to add fish and wildlife enhancement as an authorized purpose of use in 14 of its permits was to allow the Bureau "to maximize operational flexibility in order to comply with the [Central Valley Project Improvement Act]." Because Westlands has no right to CVP water that Congress directed the Bureau to put to other uses in the Central Valley Project Improvement Act, changes in the Bureau's permits that will allow the Bureau to comply with the Central Valley Project Improvement Act will not interfere with Westlands's rights, and therefore the changes will not operate to the injury of Westlands as a legal user of CVP water within the meaning of section 1702. Consequently, the Board did not err in approving the Bureau's petition to change the purposes of use in its permits, and we will affirm the judgment in *Westlands Water District v. State Water Resources Control Board* (Super.Ct.Sac.County, 2003, No. 00CS00603) denying Westlands's mandamus petition.[54]

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[54] Because Westlands has no right under its contract with the Bureau to water that Congress allocated to fish and wildlife under the Central Valley Project Improvement Act, we have no occasion to directly address the public trust doctrine as a basis for allocating CVP water to fish and wildlife purposes. It should be noted, however, that because the rights of an appropriator are always subject to the public trust doctrine (*see National Audubon Society v. Superior Court, supra*, 33 Cal.3d at p. 447, 189 Cal.Rptr. 346, 658 P.2d 709), the same is true of the rights of a person who contracts with an appropriator for the use of the water appropriated. An appropriator cannot give away more rights than he or she has.

B

Santa Clara's Challenge To The Board's Place Of Use Determination

Santa Clara is a water district that serves all of Santa Clara County; the district's boundaries are contiguous with the county's. A substantial amount of the water supplied by Santa Clara comes from the CVP under a contract with the Bureau, which the parties entered into in June 1977. As noted above, under the Board's revised analysis, Santa Clara included 20,912 acres of encroachment lands and 561,199 acres of expansion lands.

Because over two-thirds of Santa Clara's total service area qualified as expansion lands, Santa Clara urged the Board to approve the Bureau's request to include all of Santa Clara's service area within the authorized place of use in the Bureau's permits.

As previously noted, the Board declined to extend the authorized place of use to include any of the expansion lands. Accordingly, in April 2000, Santa Clara filed a petition for a writ of mandate and complaint for declaratory relief seeking to set aside the Board's decision "insofar as it attempts to limit the authorized place of use of CVP water delivered by the Bureau to any geographic area less than the entirety of Santa Clara County" and seeking a declaration that "the authorized place of use for CVP water within Santa Clara County pursuant to the consolidated permits held by the Bureau for the CVP to be the entire gross service area of the District." (*Santa Clara Valley Water District v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311549).) The *Santa Clara* case was one of the cases added to this coordinated proceeding in November 2000.

In its writ petition, Santa Clara argued that the Board had abused its discretion "[i]n limiting the CVP's authorized

place of use to less tha[n] Santa Clara's entire service area" because "the express language in the Bureau's CVP permits . . . defines place of use explicitly in terms of water district service areas." The trial court disagreed, concluding the Board had not abused its discretion in interpreting the language of the permits. Accordingly, the court entered a judgment denying Santa Clara's writ petition and complaint for declaratory relief.

On appeal, Santa Clara contends the Board erred in "constru[ing] the provisions governing place of use in the Bureau's water right permits solely in terms of the maps attached to the Bureau's original applications." For the reasons that follow, we find no error.

Santa Clara contends that eight of the Bureau's permits "originally identified Santa Clara County as within the authorized place of use."[55] Before we examine the applications and permits, we pause to examine the pertinent provisions of the Water Code and related regulations.

Section 1260 requires every application for a permit to appropriate water to set forth "[t]he place where it is intended to use the water." (§ 1260, subd. (f).) Section 1261 provides that "[a]ll applications shall be accompanied by as many copies of

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[55] The eight permits on which Santa Clara relies are the following:

(1) Permit No. 11315, issued in April 1958 on application No. 13370 (filed Oct. 1949); (2) Permit No. 11316, issued in April 1958 on application No. 13371 (filed Oct. 1949); (3) Permit No. 11968, issued in September 1959 on application No. 15374 (filed June 1953); (4) Permit No. 11969, issued in September 1959 on application No. 15375, (filed June 1953); (5) Permit No. 11971, issued in September 1959 on application No. 16767, (filed Dec. 1955); (6) Permit No. 11973, issued in September 1959 on application No. 17374, (filed Nov. 1956); (7) Permit No. 12364, issued in July 1960 on application No. 17376, (filed Nov. 1956); and (8) Permit No. 12860, issued around July 1961 on application No. 15764 (filed Mar. 1954).

such maps, drawings, and other data as may be prescribed or required by the board, and such maps, drawings, and other data are part of the application."[56] Presently, Board regulations require the filing of a "general project map," which "should show . . . the place of use." (Cal.Code Regs., tit. 23, § 715, subd. (a).) This requirement of a map showing the place of use dates back to at least the 1920's.[57] (*See Rich v. McClure* (1926) 78 Cal.App. 209, 212-213, 248 P. 275 [quoting former regulation 5 of the Water Commission Act as requiring the filing of "'[m]aps in duplicate . . . showing . . . the location of the . . . places of use'"].)

We now turn to the permits on which Santa Clara relies.

1. *The American River Permits*

The Bureau filed applications Nos. 13370 and 13371 in October 1949 to appropriate water from the American River. The Bureau later filed amended applications in 1952.

Application No. 13370 stated that the water appropriated under that application was to be used for irrigation. On the second page of the application, under the heading "Description of Proposed Use," in the space provided to identify the "Place of Use," the application stated "(*see* supplement and accompanying maps)." Another part of this section stated: "Irrigation Use. The area to be irrigated is any 500,000 acres during a single year within acres [*sic*] the gross service area as shown on the accompanying maps."

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[56] These provisions derive from section 16 of the Water Commission Act; the pertinent language has remained unchanged since 1913. (Stats. 1913, ch. 586, § 16, p. 1021.)

[57] Although neither side has cited the actual regulation in effect between 1949 and 1956, when the Bureau filed the applications at issue here, neither side disputes that the regulations of the Board and its predecessors have always required the filing of a map showing the place of use.

The supplemental portion of the application contained the following pertinent provisions. The first paragraph (labeled "*GENERAL*") stated: "The service areas of the Santa Clara and Pacheco Pass Conduits are included at present within the scope of this application. However, more refined planning studies on these conduits are being conducted which may show that it will be more desirable to use portions of the water supply available under this application in parts of the potential service area other than those shown under the Santa Clara and Pacheco Pass Conduits. The details concerning these two conduits will be supplied after the present planning studies are completed."

Under "*Paragraph 11: PLACE OF USE*," the application stated: "The water will be used within the service areas of districts, municipalities, water companies, corporations, and other legal entities within the gross area of the place of potential use delineated on maps No. 353-205-105 and No. 353-205-106, provided that the delivery of the water is conditioned upon execution of valid contracts for such deliveries."

Maps Nos. 353-205-105 and 353-205-106, which were prepared in August 1951, together depicted an area identified as the "Potential Service Area" for the Bureau's American River applications Nos. 13370 and 13371. (For reference, we will refer to this area as the map service area.) A note on both maps stated: "The service area shown on this map is the gross area capable of receiving water applied for in applications 13370 and 13371." As depicted on map No. 353-205-106, that portion of the map service area located in Santa Clara County consisted of only a part of the county. The map also showed a "tentative location" for the Santa Clara Conduit.

Application No. 13371 stated that the water appropriated under that application was to be used for municipal, industrial, domestic, and recreation purposes. On the second page of the application, under the heading "Description of Pro-

posed Use," the application designated as the "Place of Use," "Parts of the service areas delineated on the accompanying maps." The accompanying maps were the same maps that accompanied application No. 13370, discussed above. The supplemental portion of the application contained the same "*GENERAL*" paragraph as application No. 13370. Also, under the heading "*Paragraphs 15 and 17: MUNICIPAL AND INDUSTRIAL USES*," the following appeared: "Water demands for municipal and industrial uses will be supplied as required to cities, towns, and other municipalities presently in existence, or as may be created within the place of use." The application then identified various counties in which the water would be used, including Santa Clara County, and provided the estimated population of those counties for every decade from 1950 through 2000.

In March 1958, in Decision 893, the Water Rights Board approved the Bureau's American River applications with various conditions that are not relevant here. The Water Rights Board issued permits Nos. 11315 and 11316 a month later.

Notwithstanding that the map service area encompassed only a part of Santa Clara County, Santa Clara argues that permits Nos. 11315 and 11316 must be read as authorizing the use of the water appropriated under those permits in *all* of Santa Clara County. Santa Clara first points to the initial paragraph in the supplemental portion of the applications, labeled "*GENERAL*." Santa Clara contends that all of Santa Clara County was to be included in the authorized place of use because the applications stated that "[t]he service areas of the Santa Clara and Pacheco Pass Conduits are included at present within the scope of this application."

Santa Clara acknowledges that the "'Santa Clara Conduit' is not expressly defined in the permit," but contends that "other documents make clear that the conduit was intended to serve the entirety of Santa Clara County."

We are not persuaded. Santa Clara does not point to any evidence contemporaneous with the Bureau's applications in 1949 or with the issuance of the permits in 1958 that even tends to suggest, let alone prove, that the service area of the planned Santa Clara Conduit at that time encompassed anything more than the *portion* of Santa Clara County that fell within the map service area. Instead, the only evidence Santa Clara cites to support its argument is a final EIR relating to the San Felipe water distribution system from March 1976, nearly 20 years after the permits were issued. Santa Clara apparently relies on a passage from that document that states: "The Pacheco Canal will be the 1.25-mile connecting link between the Pacheco Tunnel and the Santa Clara Tunnel and Conduit (*serving Santa Clara County*), and the Hollister Conduit (serving San Benito County)." (Italics added.)

This isolated passage from an EIR prepared *by Santa Clara* in 1976 provides absolutely no insight into what *the Bureau* intended the service area of the Santa Clara Conduit to be in 1949 when the Bureau first filed its American River applications, or what *the Water Rights Board* intended the authorized place of use to be in the American River permits when the Board issued those permits in 1958. Given that the maps attached to the Bureau's applications showed a tentative location for the Santa Clara Conduit feeding into a depicted service area in Santa Clara County that consisted of only part of the county, the reasonable conclusion is that the portion of the map service area within Santa Clara County was the service area of the Santa Clara Conduit referenced in the "*GENERAL*" paragraph of the supplemental portion of the applications.

Santa Clara next relies on the language in paragraph 11 of the supplemental portion of application No. 11370. According to Santa Clara, "[a] careful reading of this paragraph confirms that place of use was never intended to be limited to areas depicted on a map. The reference to maps is simply a

limitation on which districts and other entities may be entitled to receive CVP water under the permit . . . . So long as the entity is within th[e] gross area [depicted on the maps], the only limitation the paragraph imposed on place of use is the requirement that the water be used within the entity's service area."

Santa Clara's argument relies on a parsing of paragraph 11 that we cannot accept. Santa Clara contends that the first part of the paragraph-"The water will be used within the service areas of districts, municipalities, water companies, corporations, and other legal entities"-identified the place where the water would be used as the service areas of the various entities with which the Bureau was going to contract for use of the water, while the second part of the paragraph—"within the gross area of the place of potential use delineated on maps No. 353-205-105 and No. 353-205-106"—identified the location of those entities. In Santa Clara's view, so long as some part of an entity's service area fell within some part of the map service area, that entity was "within" the map service area and was therefore one with which the Bureau might contract for use of the water. The water could then be used in *all* of that entity's service area, even in parts that are outside the map service area.

Paragraph 11 can reasonably be read another way, however. Instead of reading the second modifying phrase-"within the gross area of the place of potential use delineated on [the] maps"-as identifying the location of the entities with which the Bureau intended to contract, that phrase can be read as further identifying the place the water would be used. In other words, the second modifying phrase does not refer to the "entities" themselves but to "the service areas" of those entities. Under this construction of paragraph 11, the water would be used "within the service areas" of various entities in places where those service areas fell "within [the map service area]." This alternate construction of paragraph 11 is more

consistent with two other parts of application No. 13370 than Santa Clara's construction.

First, as we have already noted, on page 2 of the application, under the heading "Description of Proposed Use" and the subheading "Irrigation Use," the application states that "[t]he area to be irrigated is any 500,000 acres during a single year *within acres [sic] the gross service area as shown on the accompanying maps*." (Italics added.) This part of the application makes clear that the water appropriated under the application-which was to be used solely for irrigation—was to be used *within the map service area*, and not within the service areas of entities which themselves were located, either in whole or in part, within the map service area.

Second, the alternate construction of paragraph 11 is more consistent with the note on each of the maps, which stated: "The service area shown on this map is the gross area capable of receiving water applied for in applications 13370 and 13371." The meaning of this note is clarified by evidence the Bureau submitted to the Board explaining the genesis of the maps that were attached to the Bureau's applications:

> "The planning lines [on the maps] included with our various applications came from field surveys conducted by [the Bureau] identifying lands under irrigation and potentially irrigable lands . . . . [¶] By using [those planning lines], [the Bureau] focused on defining the potential service areas for irrigation and not other purposes . . . . Of course, the focus of [the Bureau] in those days was on providing water for irrigation. Other purposes were considered secondary. So, the proposed gross area boundary line was consistent with [the Bureau]'s main purpose at the time."

Other evidence from the Bureau established that it was unlikely CVP water could be delivered to much of Santa Clara County "due to mountainous terrain." Taken together, this

evidence tends to show that the part of the map service area that fell within Santa Clara County represented all of the lands in the county that were under irrigation or considered potentially irrigable lands when the Bureau filed its applications. Only that portion of the county was eligible to receive water appropriated under permit No. 11315 because the sole purpose of use that permit authorized was irrigation. The remainder of the county consisted of mountainous terrain that was not considered irrigable and therefore could not receive the water appropriated under that permit. Thus, the more reasonable construction of paragraph 11 is the one that recognizes the water appropriated under permit No. 11315 would be used only within those portions of the service areas of the entities with which the Bureau contracted that fell within the map service area.

Limiting the authorized place of use to the map service area also makes sense from a practical standpoint. By referring to the maps, the Water Rights Board would have been able to determine with a reasonable degree of certainty where the Bureau intended to use the water it was seeking to appropriate. If we were to accept Santa Clara's argument, however, the Water Rights Board would have had no way of knowing where the water would be used. (Cf. *Central Delta Water Agency v. State Water Resources Control Bd., supra*, 124 Cal.App.4th at p. 261, 20 Cal.Rptr.3d 898 [Board erred in granting permit to appropriate water where applications "fail[ed] to set forth the actual use or uses of the impounded water" because "it was not possible for the Board to estimate the reasonable amount of water that could be put to any specific beneficial use"].) When the Bureau submitted its application, it was not even able to identify the entities with which it intended to contract for use of the water, let alone the extent of the service areas of those unknown entities. Thus, the place of use would have been an amorphous area, subject to change with each new contract.

The only reading of permit No. 11315 that makes sense from a practical standpoint and that harmonizes the various parts of the underlying application and the evidence relevant to that application is one which recognizes that the authorized place of use for the water appropriated under permit No. 11315 was the map service area, not the service areas of entities the Bureau had not yet even identified.

We likewise conclude that the authorized place of use for the water appropriated under permit No. 11316 was the map service area. Application No. 13371 plainly identified the place of use as "[p]arts of the service areas delineated on the accompanying maps." The application also specified that the water would be supplied "to cities, towns, and other municipalities presently in existence, or as may be created *within the place of use.*" (Italics added.)

Santa Clara contends that "[i]nclusion of . . . references to Santa Clara County and its entire population would make no sense if the intent was to *exclude* substantial parts of the County and its population." But the reference to the population of Santa Clara County does not alter the meaning of the parts of application No. 13371 set forth above, which Santa Clara has ignored. The application expressly identified the place of use by reference to the accompanying maps. Therefore, we conclude the authorized place of use for the water appropriated under permit No. 11316 was the service area depicted on those maps.

Santa Clara tries to find support for its reading of the American River permits in Decision 893, the decision of the Water Rights Board that authorized the issuance of those permits. Santa Clara points out that "[a]t the same time it approved the Bureau's American River applications in D893, the [Water Rights] Board denied [four] other" applications to appropriate water from the American River for use in Santa Clara County, including two applications filed by Santa Clara's predecessor, the Santa Clara Valley Water Conserva-

tion District. According to Santa Clara, the Water Rights Board denied these applications because the service areas of the applicants "were within the authorized place of use of water appropriated under the Bureau's American River permits."

A thorough review of the part of Decision 893 on which Santa Clara relies reveals the flaw in Santa Clara's argument. In its decision, the Water Rights Board addressed 20 different applications filed by entities ranging from the City of Roseville to the City of Stockton to the Elk Grove Irrigation District. Among those 20 applications were the two filed by Santa Clara's predecessor. The Water Rights Board concluded all of the applications "should be denied, the evidence indicating that the approval of those applications would serve no useful purpose. The point or points of diversion under each of those applications is Folsom Dam and/or Nimbus Dam to which right of access has not been acquired by the applicants. Accordingly, issuance of permits to those applicants would be meaningless in view of the obvious necessity of contracting with the United States for a supply of water from the Federal facilities. The service areas which those applicants desire to supply may be supplied equally well and with less administrative confusion by contract with the United States. Permits are being issued to the United States to appropriate enough American River water to adequately supply the applicants naturally dependent on that source and availability of water to such applicants is reasonably assured by the terms to be contained in the permits to be issued to the United States restricting exportation of water under those permits insofar as exportation interferes with fulfillment of needs within Placer, Sacramento and San Joaquin Counties. Other applicants in more remote areas must if necessary seek water from other sources."

Santa Clara emphasizes the Water Rights Board's assertion that "*availability of water to such applicants is reasonably*

assured by the terms to be contained in the permits to be issued to the United States," but Santa Clara ignores the obvious meaning of the term "such applicants" and the language following "United States." "Such applicants" refers to "the applicants naturally dependent on" the American River. Understandably, Santa Clara does not claim that Santa Clara County is an area *naturally* dependent on water from the American River. Moreover, the language following "United States" refers to a permit condition that, as the decision states, was imposed to protect the "fulfillment of needs within Placer, Sacramento and San Joaquin Counties."[58] Thus, the Water Rights Board was explaining that the availability of water to applicants within Placer, Sacramento, and San Joaquin Counties who were naturally dependent on the American River was "reasonably assured" by the permit condition that restricted the export of water appropriated under the American River permits until the needs of those counties were fully met. Obviously, understood properly, this portion of Decision 893 provides no support for Santa Clara's argument that the authorized place of use in the American River permits extended to all of Santa Clara County.

For the foregoing reasons, we conclude the Board did not err in construing the authorized place of use in permits Nos. 11315 and 11316 as the service area shown on the maps attached to the applications for those permits.

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[58] That permit condition, which appears in permits Nos. 11315 and 11316, states: "Deliveries of water under this permit shall be limited to deliveries for beneficial use within Placer, Sacramento and San Joaquin Counties and shall not be made beyond the westerly or southerly boundaries thereof, except on a temporary basis, until the needs of those counties, present or prospective, are fully met provided, however, that agreements in accordance with Federal Reclamation laws between permitee and parties desiring such service within said counties are executed by July 1, 1968."

2. *The Trinity River/Clear Creek Permits*

Permits Nos. 11968, 11969, 11971, and 11973 to appropriate water from the Trinity River, were issued in September 1959. Permit No. 12364 to appropriate water from Clear Creek was issued in July 1960. When initially issued, these five permits allowed use of the water "within a gross area of 4,031,000 acres as shown on Map 416-208-341." That map depicts an area extending south from Trinity County down the Central Valley to around Kettlemen City, in Kings County; it does not include any portion of Santa Clara County.

In December 1959-before permit No. 12364 was even issued-the Bureau filed petitions to change the place of use in all five of the permits. Following two amendments, the petitions proposed to "consolidate the place of use and add new lands as shown on Maps 214-208-3330 and 214-208-3331 revised as of July 19, 1960." In change order No. 38, issued in December 1960, the Water Rights Board approved the petitions and ordered that the permits be amended so that the place of use was described as follows:

> "p) The place of use under Permits 11968, 11969, 11971, and 11973 is within a gross area of 10,925,000 acres to be served by Trinity River water as shown on maps numbered 214-208-3330 and 214-208-3331 revised as of July 19, 1960.
>
> "q) The place of use under Permit 12364 is within a gross area of 10,821,000 acres to be served by Clear Creek water as shown on said maps numbered 214-208-3330 and 214-208-3331 revised as of July 19, 1960."

Map No. 214-208-3331 depicts a service area covering part, but not all, of Santa Clara County. This service area appears to be coextensive with the service area depicted on the maps attached to the Bureau's American River applications, discussed above.

Santa Clara notes that all five of the permits contained "place of use" language like that contained in paragraph 11 of application No. 13370, discussed above. Noting the difference between the gross area to be served under the permits originally (4,031,000 acres) and the gross area to be served under the amended permits (over 10,000,000 acres), Santa Clara argues that "[i]f the authorized place of use was limited only to the areas depicted on maps, such a significant expansion in the acreage of authorized use would not be possible." According to Santa Clara, "[t]he only way to achieve such an expansion-from 4 million to 20 million acres-requires an interpretation of Paragraph 11 to reflect the intent that CVP water would be available for use throughout the service areas of districts and other legal CVP contractors."

We disagree. First, Santa Clara overstates the extent of the expansion. It is true the service area for the Trinity River permits was expanded to a gross area of 10,925,000 acres, while the service area for the Clear Creek permit was expanded to a gross area of 10,821,000 acres. But these service areas were not mutually exclusive; instead, the service area for the Clear Creek permit was subsumed in the service area for the Trinity River permits. As the Water Rights Board explained in change order No. 38, water from the Trinity River could be directly diverted at Lewiston Dam *or* could be conveyed through a tunnel and released into Whiskeytown Reservoir on Clear Creek. Thus, Trinity River water could either be used in the area serviced by direct diversions from Lewiston Dam or could be conveyed to Whiskeytown Reservoir, where it would be added to the water from Clear Creek and used in the area serviced by that water. The service area for the Trinity River permits *had* to be larger than the service area for the Clear Creek permit to include the land serviced by the water diverted at Lewiston Dam. Consequently, the expansion at issue was an expansion from 4 million to 10 million acres, not 4 million to 20 million acres.

Santa Clara fails to show that an expansion from 4 million to 10 million acres would have been impossible based on the areas depicted on the maps. A comparison of map No. 416-208-341 (the map depicting the original service area for the Trinity River and Clear Creek permits) and maps Nos. 214-208-3330 and 214-208-3331 (the maps depicting the new service area for those permits) shows that a significant amount of land was added to the service area. In addition to the parts of Santa Clara County and San Benito County that were added, the part of the service area covering the San Joaquin Valley was substantially expanded to include parts of Merced, Madera, Fresno, and Kings Counties that were not previously covered, and to include for the first time parts of Tulare and Kern Counties.

Santa Clara points to no evidence to show that the service area referenced in change order No. 38 as being more than 10 million acres must be something other than the service area delineated on maps Nos. 214-208-3330 and 214-208-3331. Thus, we conclude the Board did not err in construing the authorized place of use in permits Nos. 11968, 11969, 11971, 11973, and 12364 as the service area shown on those maps.

3. *The Delta-Mendota Canal And San Luis Reservoir Permit*

Application No. 15764, which was originally filed by West-lands in March 1954, sought to appropriate water from Old River, a channel of the Delta, for diversion through the Delta-Mendota Canal to the San Luis Reservoir. Westlands assigned the application to the Bureau in 1960, and the Bureau filed petitions to amend the purposes of use and places of use in the original application. As amended, the application proposed to divert water for irrigation, incidental domestic and stockwatering, municipal, industrial, and recreational uses. The place of use was described as "San Joaquin Valley and Alameda, Santa Clara, and San Benito Counties; *See* attached maps numbered 214-208-3348, 214-208-3349 and 214-208-3350, all dated December 1, 1960." It appears,

however, that the original application filed by Westlands encompassed only the San Joaquin Valley, and the Bureau sought to add the three counties, including Santa Clara County, by amendment.

The Water Rights Board approved the Bureau's application in June 1960 in Decision 1020 and issued permit No. 12364 to the Bureau. The Water Rights Board did not approve the application in its entirety, however. In Decision 1020, the Water Rights Board noted that it had entered into a stipulation with certain protestants to the application, which provided, in part, that "the [Bureau's] petition to include lands within Alameda, Santa Cruz [*sic*] and San Benito Counties" was deferred indefinitely. This appears to explain why, on the amended application, a line was drawn through "Alameda, Santa Clara, and San Benito Counties" in the place of use, with a direction to *see* Decision 1090. The reference to "Santa Cruz County" in Decision 1090 appears to have been a mistake; the reference should have been to Santa Clara County. This conclusion is supported by the fact that on the maps attached to the application, the depicted service area does not include any part of Santa Cruz County, but does include part of Santa Clara County.

Santa Clara has provided no evidence that the Water Rights Board ever took up the deferred issue of whether to include Santa Clara County within the authorized place of use in permit No. 12364.

In any event, even if the Water Rights Board had approved the application with respect to Santa Clara County, the application and permit would not support Santa Clara's argument that the place of use extended to all of Santa Clara County. Santa Clara contends that under application No. 15764, the "authorized place of use is . . . defined in terms of contractor service areas, not historical maps," but we disagree. In a space on the application made available to give the name and address of the owner of the land on which the water

would be used, and to state what arrangements had been made with the owner, the Bureau stated: "Irrigation and water districts existing or to be formed within the service area service contracts being negotiated." Santa Clara relies on this to argue that the place of use was intended to encompass the entirety of its district. What Santa Clara ignores, however, is the fact that the application specifically refers to the attached maps in identifying the place of use. One of those maps, No. 214-208-3349, depicts the "San Luis Unit Place of Use" as covering the same *part* of Santa Clara County depicted on the maps relating to the American River, Trinity River, and Clear Creek permits, rather than the entire county. Santa Clara also ignores the fact that the reference to "[i]rrigation and water districts existing or to be formed within the service area" does not purport to be a description of the place of use, but an identification of the owners of the land on which the water was to be used. The extent of that land, however, is the service area depicted on the attached map. Accordingly, we conclude the Board did not err in construing the authorized place of use in permit No. 15764 as the service area shown on that map.

4. *The Testimony Of The Bureau's Representative*

Santa Clara quotes extensively from the testimony of a Bureau representative (Connie Rupp), who testified that the Bureau understood the authorized place of use in its permits extended further than the service areas depicted on the various maps. The Bureau's understanding of what the permits authorized is irrelevant, however, unless that understanding is based on a reasonable interpretation of the permits. Rupp testified that the Bureau believed it was "inappropriate to use [the map] lines as the basis for analyzing the authorized place of use" because "the [Board] authorized use of CVP water within district service areas at the time initial long-term contracts were signed with [the Bureau]." Although this statement is not entirely clear, it appears from Rupp's testimony

that the Bureau's understanding of the authorized place of use in its permits was based on the same interpretation of paragraph 11 that Santa Clara has advanced in this appeal. We have rejected that interpretation already. The only *reasonable* interpretation of the permits is that the authorized place of use in each permit was the service area depicted on the map filed with the application.

5. *Estoppel*

Santa Clara contends the Board is equitably estopped from asserting that the authorized place of use in the Bureau's permits is anything less than all of Santa Clara County. We disagree.

"Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel:

> (1) the party to be estopped must be apprised of the facts;
>
> (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305, 61 Cal.Rp tr. 661, 431 P.2d 245.)

Santa Clara contends the first element is met because the Board knew as early as 1985, when the Bureau filed its request to consolidate and expand the places of use in its permits, "of the possibility that water deliveries might be in 'technical noncompliance with the project's water rights.'" Santa Clara suggests the second element is met because, despite this knowledge, the Board "never questioned the delivery of CVP water throughout Santa Clara's contractor service area based on place of use considerations." Santa Clara contends the fourth element is met because it has "developed

an integrated water delivery system that blends CVP water with water from other sources for distribution throughout the District's service area." Santa Clara does not address the third element.

Under these circumstances, no estoppel has been shown. Among other things, Santa Clara points to no evidence that it relied *to its injury* on the Board's alleged failure to limit the use of CVP water in Santa Clara County to the portion of the county depicted on the maps attached to the Bureau's applications. Santa Clara asserts that it "cannot physically operate its water distribution system in a manner consistent with" "[a]n interpretation of place of use in terms of [the] historical maps," "and it *would be* injured irreparably *if* it were required to do so" because it would have to develop a duplicate water delivery system. (Italics added.) From this assertion, it is apparent Santa Clara has not yet suffered any injury; nor does it appear Santa Clara *will* suffer any injury. To the extent Santa Clara has delivered water to locations in its service area that were outside the authorized place of use in the Bureau's permits before Decision 1641, those locations are encroachment lands which have now been *included* in the authorized place of use. Thus, Santa Clara's continued delivery of CVP water to those encroachment lands (not expansion lands) is now authorized under the Bureau's permits, and there is no risk Santa Clara will have to develop a duplicate water system or dismantle its existing system to continue serving those encroachment lands. Under these circumstances, there is simply no basis for estopping the Board from asserting an interpretation of the Bureau's permits that we have found to be correct.

For the reasons set forth above, we conclude the Board did not err in determining that the authorized place of use in the Bureau's permits was the service area shown on the maps attached to the Bureau's applications. Accordingly, the trial court correctly denied Santa Clara's mandamus petition and

complaint for declaratory relief, and we will affirm the judgment in *Santa Clara Valley Water District v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311549).

C

The Board's Challenge To The Trial Court's Interpretation Of The Merger Law

As we have explained, in Decision 1641 the Board approved the addition of the encroachment lands to the authorized place of use in the Bureau's permits, subject to certain mitigation requirements. The Board refused to include the expansion lands, but determined they could be added on a case-by-case basis in the future.

As we have also noted, under the Board's revised analysis Westlands included 30,718 acres of encroachment lands and 9,664 acres of expansion lands. According to the change EIR, the availability of CVP water facilitated the development of 30,607 acres of the encroachment lands in West-lands from annual grassland, alkali scrub, and riparian habitats into irrigated agriculture land uses.

In January 2000, Westlands and a number of individuals, partnerships, and corporations who own or lease land within the encroachment and expansion lands of Westlands[59] filed a first amended petition for writ of mandate and complaint for declaratory relief asserting 13 causes of action against the Board. (*Anderson v. State Water Resources Control Board* (Super. Ct. Fresno County, 2003, No. 645385-6).) This was

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[59] We will refer to these encroachment and expansion landholders collectively as the Anderson parties because Angela G. Anderson was the first plaintiff listed in the amended petition. To the extent we need to distinguish between those of the Anderson parties who are already receiving CVP water and those who are not, we will refer to them, respectively, as the encroachment landholders and the expansion landholders.

one of the four cases originally coordinated in this proceeding in July 2000.

In their petition, Westlands and the Anderson parties alleged (among other things) that "[c]onforming the [place of use] to the Westlands boundary is a ministerial act because the delivery of CVP water . . . to the whole of Westlands . . . was authorized by the Legislature in 1965 pursuant to" the Merger Law. They sought a writ directing the Board to unconditionally conform the place of use in the Bureau's CVP permits to the boundaries of Westlands.

The trial court agreed with Westlands and the Anderson parties about the effect of the Merger Law. Accordingly, the court entered a judgment ordering the issuance of a writ of mandate "directing the [Board] to conform the places of use under the Bureau of Reclamation's Central Valley Project permits to include both the encroachment and expansion lands within Westlands Water District. The Board shall not require mitigation for this ministerial confirmation. In all other respects, the petition for writ of mandate is denied."

The Board filed a timely notice of appeal, and the Anderson parties filed a cross-appeal.

1. *The Merger Law*

On appeal, the Board contends "the trial court erred in reading the Merger Law as trumping the . . . Board's authority under the Water Code to limit CVP water delivery within Westlands . . . to the places of use described in the CVP permits." We agree.

The trial court's statement of decision provides a succinct description of the historical context for the enactment of the Merger Law. As the court explained: "The original Westlands was formed in 1952 and consisted of approximately 400,000 acres located on the eastern two-thirds of the present-day district. The original Westlands obtained a CVP contract

in 1963. West Plains Water Storage District was formed in 1962 and originally covered 200,000 [acres] in the western one-third of today's [Westlands] district. West Plains itself was divided into an area entitled to receive CVP water and a second area qualified for SWP water. The Solicitor of the U.S. Department of Interior opined that federal water could be delivered only to Westlands and that portion of West Plains entitled to receive CVP water. Because of this problem, federal and state officials began discussing the merger of the two districts so that water could be provided to West Plains. In a 1964 memorandum from the Department of the Interior ('Holum memorandum'), the department suggested a merger and pledged to provide water to a combined district under Westlands' original 1963 contract, plus the remaining yield of the CVP San Luis Unit."[60]

It was in this context that the Legislature enacted the Merger Law, which took effect immediately in June 1965. (Stats.1965, ch. 746, § 1, p. 2159.) The Merger Law merged the West Plains district into Westlands. (§ 37820.)

It must be recalled that when the Legislature enacted the Merger Law, the pertinent provisions of the Water Code provided that a permittee (like the Bureau) could "change the . . . place of use . . . from that specified in [its] permit . . . only upon permission of the board" (at that time, the Water Rights Board). (§ 1701.) Moreover, before the Water Rights Board could grant that permission, it had to find "that the change [would] not operate to the injury of any legal user of the water involved." (§ 1702.)

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[60] We understand that the area of West Plains entitled to receive CVP water was within the authorized place of use for the Bureau's CVP permits at that time (as shown on the maps attached to the Bureau's applications), while the area that qualified only for SWP water lay outside that authorized place of use. The Anderson parties all hold land within the latter area-that is, outside the authorized place of use under the Bureau's permits at that time.

The trial court agreed with the Anderson parties, however, that by enacting the Merger Law, the Legislature "effectuated a statutory authorization for the delivery of federal CVP water to all of the lands of the combined Westlands-West Plains district," including that portion of West Plains that was then outside the place of use authorized in the Bureau's CVP permits. According to the trial court, this "statutory authorization" imposed a ministerial duty on the Board to include all of Westlands within the authorized place of use in the Bureau's CVP permits without considering whether the change would injure any legal user of the water and without imposing any mitigation requirement. (*See* CEQA, § 21080, subd. (b)(1) [CEQA does not apply to "[m]inisterial projects"].) In effect, the trial court concluded that by enacting the Merger Law, the Legislature intended to circumvent the usual procedures and requirements for changing the place of use in a permit to appropriate water. The trial court concluded the legislative intent to accomplish this result could be found in numerous provisions of the Merger Law. We turn now to those provisions.

Section 37801 identifies the state interest behind the Merger Law: "The state and the people thereof have a primary and supreme interest in securing to the inhabitants and property owners within and adjacent to the federal service area of the San Luis unit of the Central Valley project now under construction by the United States the greatest possible use and conservation of the waters to be made available from said unit and the greatest use thereof to the area, thereby assuring that the greatest productivity of the largest possible area may be accomplished and safely carried on within reasonable limits of economy."

Section 37802 identifies the need for a special law: "Investigation having shown that conditions in and surrounding the federal service area of the San Luis unit of the Central Valley project are peculiar to that area, it is hereby

declared that a general law cannot be made applicable thereto and that this part is therefore necessary for the proper distribution, uses, and control of the natural supplies of water now available for said area and of the water to be made available from the San Luis unit of the Central Valley project, and for elimination of duplication of governmental authority, the securing of greater economy of administration, and the more efficient and effective utilization of ground water and imported water supplies."

Section 37821 provides that the new Westlands district will consist of "all land in the water district immediately following the merger plus inclusion, and less exclusions, of land thereafter made pursuant to law."

Section 37826 provides that "[u]pon the merger," the new Westlands district will succeed "to all properties, rights, and contracts of each of the two districts."

Section 37856 gives "[l]ands which were within [Westlands] immediately prior to the merger . . . a prior right with respect to water to which [Westlands] was entitled under any contract with the United States in effect on the date of [the] merger over (1) lands added to [Westlands] as a result of the merger and (2) lands annexed to [Westlands] subsequent to the merger."

Finally, section 37805 provides that the Merger Law is to "be given a liberal construction for the purpose of sustaining any and all proceedings taken hereunder."

Based on the foregoing provisions, the trial court concluded: "The [L]egislature may not have explicitly said that the place of use under the Bureau's CVP permits was accordingly modified, but the normal and intended consequences of what the [L]egislature did say are to require and effectuate such a place of use modification." We cannot agree.

"Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law."

(*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000, 90 Cal.Rptr.2d 236, 987 P.2d 705.) As we have previously stated, in construing statutes "we look first at the words themselves, giving them their usual and ordinary meaning and construing them in context." (*People v. Johnson, supra,* 28 Cal.4th at p. 244, 121 Cal.Rptr.2d 197, 47 P.3d 1064.)

Nowhere in the provisions of the Merger Law do we find any expression of intent by the Legislature to accomplish, by legislative fiat, a change in the authorized place of use in the Bureau's CVP permits, or to impose on the Water Rights Board a ministerial duty to approve such a change, in circumvention of the usual procedures and requirements of the Water Code. Even the most liberal construction of the Merger Law does not allow us to discern in its provisions such a command. (*See Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 844, 102 Cal.Rptr.2d 719, 14 P.3d 930 ["As a rule, a command that . . . a statute be liberally construed 'does not license either enlargement or restriction of its evident meaning'"].)

The most substantive provision of the Merger Law on which the trial court relied is section 37826, which provided that the new Westlands district would succeed to all of the "properties, rights, and contracts" of the two existing districts. According to the trial court, this provision "authoriz[ed] the use of contract water on all district lands." We cannot accept this overly broad construction of that statute.

It is certainly true that by virtue of section 37826, the landholders in West Plains became entitled to the benefits of the 1963 water service contract between Westlands and the Bureau. But that contract was itself subject to the terms of the Bureau's permits, including the place of use authorized in those permits. To the extent the landholders in West Plains were already within the place of use authorized in the Bureau's CVP permits, section 37826 made those landholders

eligible to receive CVP water because all that remained for them to achieve that eligibility was a contract with the Bureau. Landholders like the Anderson parties, however, needed two things to be eligible to receive CVP water: they needed a contract with the Bureau, *and* they needed their lands to be added to the authorized place of use in the Bureau's permits. Section 37826 accomplished the former, but not the latter. Nothing in that statute purports to make any change in the Bureau's permits to appropriate water for the CVP or purports to impose on the Water Rights Board a ministerial duty to make such a change. Had the Legislature intended to make such a change or impose such a duty, it could have said so, but it did not, and we are powerless to add words to the statute that the Legislature omitted. (*See* Code Civ. Proc., § 1858 ["In the construction of a statute . . . the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted . . . ."].)

Citing section 37856-which gave priority in the use of CVP water under the 1963 contract to those landholders in the original Westlands district-the trial court concluded, "the [L]egislature was aware the Merger Statute would have immediate, actual water distribution consequences." We disagree that any such consequences would be "immediate," since the San Luis unit that would supply CVP water to Westlands was still under construction at the time. (*See* § 37801.) And though the grant of priority would eventually have "actual" consequences, those consequences do not justify the conclusion that the Legislature intended to mandate a change in the Bureau's CVP permits in circumvention of the usual Water Code procedures and requirements. Section 37856 ensured that when the San Luis unit was completed, the landholders in the original Westlands district would have priority over any West Plains landholders who were then eligible to receive CVP water. That section, however, did nothing to *establish* that eligibility. As we have

explained, section 37826 made those West Plains landholders who were already in the authorized place of use for the Bureau's CVP permits eligible to receive CVP water because all they needed to be eligible was a contract with the Bureau. But the West Plains landholders who were *not* in the authorized place of use needed to secure a change in that place of use also. Nothing prevented the Bureau from filing with the Water Rights Board a petition for such a change, nor is there any reason to believe that the administrative process to secure the change could not have been completed while the San Luis unit was finished. Most importantly, however, nothing in section 37856-or any other part of the Merger Law-shows a legislative intent to circumvent that normal administrative process.

As for the declaration of the state interest behind the Merger Law in section 37801, we have no doubt that in referring to "the inhabitants and property owners . . . adjacent to the federal service area of the San Luis unit of the Central Valley Project," the Legislature was referring to those landholders (like the Anderson parties) who held land in that portion of West Plains that was eligible to receive only SWP water. But by noting the "primary and supreme interest" in securing to those landholders "the greatest possible use" of the CVP water that was going to be available to Westlands upon completion of the San Luis unit, the Legislature did not accomplish a legislative circumvention of the existing procedures and requirements under the Water Code for obtaining a change in a permit to appropriate water. The statement of the intent behind the Merger Law must be read as expressing the intent behind the substantive provisions of the law; it cannot reasonably be read as having any substantive effect of its own-certainly not the effect of changing or mandating a change in the Bureau's CVP permits by legislative fiat.

The same is true of the declaration of the need for a special law in section 37802. By noting that a special law combining

Westlands with West Plains was necessary "for the proper distribution, use, and control . . . of the water to be made available from the San Luis unit of the Central Valley project" and for the "elimination of duplication of governmental authority," the Legislature did not legislatively circumvent the existing procedures and requirements under the Water Code for obtaining a change in a permit to appropriate water. Much like the declaration of state interest in section 37801, this declaration of need must be read as expressing the need for the substantive provisions of the law; it cannot reasonably be read as effecting any substantive change itself.

The Anderson parties argue that the "[t]he language regarding the 'elimination of duplication of government authority' expresses an intent the District not be subject to a duplication of government authority with respect to where the water is authorized to be used." We do not agree. This language is more reasonably read as recognizing that the merger of the two districts would eliminate the duplication of government authority that is necessarily present where two districts-which themselves have "government authority"—exist instead of one. In any event, as we have explained, a statement of intent or need like those in sections 37801 and 37802 does not itself accomplish any substantive change; it merely explains the purpose behind the substantive provisions that do so. None of the substantive provisions in the Merger Law accomplish (or mandate) a change in the terms of the Bureau's CVP permits.

Finally, section 37805's requirement that the Merger Law "be given a liberal construction" adds nothing to the analysis. As we have explained already, even the most liberal construction of the Merger Law does not allow us to discern in its provisions the legislative intent to accomplish or mandate a change in the Bureau's CVP permits in circumvention of the usual administrative procedures and requirements for accomplishing such a change. The rule of liberal construction does not allow us to add language to a statute

that the Legislature omitted. (*See Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra*, 24 Cal.4th at p. 844, 102 Cal.Rptr.2d 719, 14 P.3d 930.)

Because we find nothing in the language of the Merger Law to support the result the trial court reached, we need not consider the legislative history of the law. No amount of legislative history could change the fact that the language of the Merger Law cannot reasonably be read as the Anderson parties and the trial court would read it. Accordingly, we conclude the trial court erred in determining that the Merger Law imposed a ministerial duty on the Board to include all of Westlands (including encroachment and expansion lands) within the authorized place of use in the Bureau's CVP permits.

2. *Judicial Estoppel*

The Anderson parties contend the Board "should be precluded from arguing against the Trial Court's interpretation of the Merger Law" by the doctrine of judicial estoppel. We disagree.

"'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.'" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181, 70 Cal.Rptr.2d 96.) The doctrine applies "when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Id.* at p. 183, 70 Cal. Rptr.2d 96.)

We find nothing inconsistent in the position the Board has taken regarding the legislative intent behind the Merger Law. In commenting on the change EIR, the Anderson parties argued that "[c]onforming the authorized [place of use] to Westlands boundaries is essentially a clerical recognition of existing conditions authorized by prior approvals. The decision to expand the authorized [place of use] to include the entire district was made as early as 1965, as evidenced by the Water Code Sections 37800 et seq. (the 'Merger Statute')." In the final change EIR, the Board responded: "Regardless of when other parties historically decided to include the entire water district within the [place of use], the pending petition before the Board requires that a formal decision be made at this time. As part of this decision, the Board is obligated to comply with the requirements of CEQA."

The Anderson parties contend this position is inconsistent with the positions the Board has taken in the trial court and in this court because "the phrase 'other parties' is an unmistakable reference to the Legislature." According to the Anderson parties, in the change EIR the Board admitted that the Legislature intended in the Merger Law to include the entire Westlands in the authorized place of use for the Bureau's CVP permits, and the Board is estopped from now asserting that the Legislature did not have that intent.

This argument fails for two reasons. First, we do not agree that the phrase "other parties" must be read as referring to the Legislature and its enactment of the Merger Law. The phrase is more reasonably read as referring to the Bureau and Westlands itself, both of which must have decided at some point that all of Westlands was within the place of use authorized in the Bureau's permits, because the Bureau began delivering CVP water to parts of Westlands that were, in fact, *not* within the place of use, and landholders in those areas accepted that water.

Secondly, even if the Board could be deemed to be an advocate that asserted in the proceedings before itself that the Legislature intended in the Merger Law to include the entire Westlands in the authorized place of use for the Bureau's CVP permits, the Board *as advocate* plainly was not successful in asserting that position because the Board *as tribunal* did not adopt that position or accept it as true. If the Board had adopted that position, it would have included all of the encroachment and expansion lands in Westlands within the authorized place of use in the Bureau's CVP permits without any mitigation requirement, as the Anderson parties wanted it to do. That it did not do so only shows that the Board has maintained a consistent position throughout these proceedings regarding the intent behind the Merger Law. Accordingly, the doctrine of judicial estoppel does not apply here.

3. *The Anderson Parties' Alternate Arguments*

The Anderson parties contend that even if the trial court erred in its interpretation of the Merger Law, the trial court's judgment-requiring the Board to include all of Westlands within the authorized place of use in the Bureau's CVP permits without any mitigation requirement-should be affirmed on several alternate bases.[61] These alternate arguments are logically divided into those that apply to the encroachment lands within Westlands and those that apply to the expansion lands.[62] We will address them in that order.

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[61] The Anderson parties assert these alternate bases for affirming the trial court's judgment in their cross-appellant's opening brief, but no cross-appeal was necessary to make these arguments. A party who advocates the affirmance of a judgment does not have to file a cross-appeal to assert the judgment was correct on grounds other than the one on which the trial court relied. (*See Warming-ton Old Town Associates v. Tustin Unified School Dist.* (2002) 101 Cal.App.4th 840, 864, 124 Cal.Rptr.2d 744.)

[62] To the extent the Anderson parties argue, in their reply brief, that the Board had a ministerial duty to include all of Westlands within the author-

a. *The Anderson Parties' Standing To Challenge The Mitigation Requirement For Addition Of The Encroachment Lands To The Place Of Use*

The Anderson parties offer numerous arguments why the Board had a ministerial duty to add the encroachment lands to the authorized place of use without any habitat mitigation requirement. Among other things, the Anderson parties argue that CEQA does not apply to actions occurring before its adoption in 1972 and that the Board does not have the authority to condition the approval of a change petition on the mitigation of adverse impacts to native habitat.

Before we may reach these alternate arguments, we must consider the issue of standing. The effect of Decision 1641 was to *include* the encroachment lands within the authorized place of use in the Bureau's permits, subject only to a habitat mitigation requirement. The Board argues that because the mitigation requirement was imposed on the Bureau, as the permit holder, and because the Anderson parties "cannot point to any evidence in the record that the mitigation will affect them," the Anderson parties lacked standing to *seek* a writ of mandate directing the Board to add the encroachment lands to the place of use without the habitat mitigation condition.[63] We agree.

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ized place of use because the maps attached to the Bureau's applications were never intended to define the place of use, we have rejected that argument already in addressing Santa Clara's appeal, and we will not address that issue further.

[63] The Anderson parties observe that the Board did not raise this argument in the trial court, or in its opening brief (which addressed only the Merger Law), but they do not contend the Board's failure to raise this argument earlier resulted in a forfeiture of the argument. The issue of standing may be raised for the first time on appeal. (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 973, fn. 3, 132 Cal.Rptr.2d 635.)

"A writ of mandate 'must be issued upon the verified petition of the party beneficially interested.' (Code Civ Proc , § 1086) 'This provision has been held to establish a standing requirement-the writ will issue only at the request of one who is beneficially interested in the subject matter of the action.'" (*Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1107, 4 Cal.Rptr.3d 453.) "'Beneficially interested' generally means the petitioner 'has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.'" (*Embarcadero Mun. Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 786-787, 107 Cal.Rptr.2d 6.) According to the Supreme Court, "This standard . . . 'is equivalent to the federal "injury in fact" test, which requires a party to prove by a preponderance of the evidence that it has suffered "an invasion of a legally protected interest that is [both] '(a) concrete and particularized, and (b) actual or imminent . . . .'"'" (*People ex rel. Dept. of Conservation v. El Dorado County* (2005) 36 Cal.4th 971, 986, 32 Cal.Rptr.3d 109, 116 P.3d 567.)

Subdivision (b) of section 1126 provides more specifically that any party "aggrieved" by a water rights decision of the Board may file a petition for a writ of mandate for review of that decision. In the context of an appeal from a civil judgment, our Supreme Court has stated that "[o]ne is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. [Citations.] Appellant's interest '"must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment."'" (*County of Alameda v. Carleson, supra*, 5 Cal.3d at p. 737, 97 Cal.Rptr. 385, 488 P.2d 953.) A party is not aggrieved by an "error that injuriously affected only nonappealing co-parties." (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1128, 269 Cal.Rptr. 844.) "This is no mere technicality, but is grounded in the most basic notion of why courts entertain civil appeals. We are here to provide relief for appellants who

have been wronged by trial court error. Our resources are limited and thus are not brought to bear when appellants have suffered no wrong but instead *Seek* to advance the interests of others who have not themselves complained. The guiding principle is one often encountered in daily life: no harm, no foul." (*Id.* at p. 1132, 269 Cal.Rptr. 844.)

The same reasoning applies with equal force to a party claiming to be aggrieved by a water rights decision by the Board. Thus, the question here is whether the rights or interests of the Anderson parties suffered an immediate, pecuniary, and substantial injury because of the Board's decision to include the encroachment lands within the authorized place of use in the Bureau's permits subject to a mitigation requirement. The Anderson parties have not identified any such injury. We are not concerned, at this point, with the exclusion of the expansion lands from the place of use. Plainly those of the Anderson parties who are expansion landholders are injured by that decision because they are excluded from receiving CVP water by that decision. In contrast, the encroachment landholders *are* entitled to receive CVP water; their lands have been *included* in the authorized place of use. Of course, the encroachment landholders could have claimed injury, and standing, if the Board had imposed the mitigation requirement on them, but the Board imposed that requirement only on the Bureau. The Bureau has not contested that requirement, nor is there any evidence in the record the Bureau intends to pass on the cost of mitigation to the encroachment landholders. Furthermore, there remains the possibility that it can be shown some or all of the encroachment lands within Westlands were converted to agricultural use before CEQA took effect, in which case not even the Bureau will face any mitigation costs with respect to those lands.

Recognizing their inability to prove that the cost of mitigation will ever be visited on them, the Anderson parties con-

tend that "Westlands and Anderson (and their suppliers, their lenders and purchasers of their lands) now hold and deal with the Encroachment Lands subject to great uncertainty as to whether [the Bureau] will implement [the Board]'s habitat mitigation condition at [the Bureau]'s sole expense." They further argue that "[t]hese uncertainties, coupled with the expense, delay and risk of going through another prolonged and expensive administrative proceeding to prove that the Encroachment Lands were being farmed prior to the adoption of CEQA . . . render these lands less desirable than identical farm lands east of the [original place of use boundary] . . . and, therefore, less valuable now."

We are not persuaded. The flaw in this argument is that it is based completely on speculation, not evidence, that the cost of the mitigation requirement will ultimately be visited on the encroachment landholders alone. On the record before us, we do not know whether the Bureau will choose to bear all the costs of mitigation itself or pass those costs on (in whole or in part) to all the users of CVP water, or just to those users within Westlands, or just to the encroachment landholders within Westlands. The Anderson parties have not shown that the uncertainty as to what the Bureau intends to do falls more heavily on their lands than on any other lands using CVP water. Thus, there is no evidentiary basis for their assertion that the encroachment lands in Westlands are less valuable because of the mitigation requirement imposed on the Bureau than other lands within the district. We cannot conclude that the encroachment landholders have suffered an immediate, pecuniary, and substantial injury as result of the Board's decision due to a decline in property value, based on mere speculation and surmise that such a decline has in fact occurred.

The Anderson parties suggest that subdivision (e) of section 1126 gave them standing to challenge the mitigation requirement. That subdivision provides: "In any court case reviewing a decision or order by the state board relating to a

permit or license to appropriate water held by the state through the department or any other state agency, or to a permit or license to appropriate water held by the United States through the Bureau of Reclamation or any other federal agency, the election by the United States, or any agency thereof, not to be a party shall not, in and of itself, be the basis for dismissal pursuant to Section 389 of the Code of Civil Procedure or any other provision of law." According to the Anderson parties, "[t]his [provision] recognizes standing in parties such as Anderson and Westlands, because they would otherwise have no adequate remedy, since [the Bureau] did not sue to challenge Decision 1641, and did, in fact, exercise its sovereign immunity to extricate itself from this litigation."

This argument fails because nothing in subdivision (e) of section 1126 purports to override the requirement in subdivision (b) of that statute that only a party "aggrieved" by a water rights decision of the Board may challenge that decision in an administrative mandate proceeding. Subdivision (e) simply ensures that the election of the Bureau not to participate in a court case will not, "in and of itself," provide the basis for a dismissal, under section 389 of the Code of Civil Procedure for failure to join an indispensable party. Here, to the extent the rejection of claims advanced on behalf of the encroachment landholders can be deemed a "dismissal," that action is not taken because the Bureau elected not to participate in the court proceedings; it is taken because the Anderson parties were not injured by the Board's decision to impose a mitigation requirement on the Bureau for including the encroachment lands in the authorized place of use in the Bureau's CVP permits.

Because we conclude the Anderson parties do not have standing to challenge the mitigation requirement imposed on the Bureau, we need not address any further their challenges to that aspect of the Board's decision. Accordingly, we turn to

their arguments that challenge the Board's refusal to include the expansion lands in the authorized place of use.[64]

b. *The Anderson Parties' Challenge To The Exclusion Of The Expansion Lands*

As we have noted, in Decision 1641 the Board explained that the change EIR discussed the expansion lands only at the programmatic level, not at the project level, "because future land and water uses in those areas cannot be readily determined, and would require speculation. More detailed site-specific environmental documents may be necessary before the [Board] can authorize delivery of water to the expansion lands." The Board explained that "[t]he expansion lands can be considered in future proceedings when any required environmental documentation has been prepared." In effect, the Board decided that it did not have adequate information before it to decide whether to grant the Bureau's request to add the expansion lands to the authorized place of use in the CVP permits.

The Anderson parties contend this aspect of the Board's decision is not supported by the evidence in the record. According to the Anderson parties, "the Expansion Lands were addressed extensively throughout [the Board]'s administrative proceedings, and a determination as to their inclusion within the place of use should have been made."

In addressing a similar argument made by Santa Clara, the trial court stated: "[CEQA] requires a lead agency to utilize

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[64] Our conclusion that the Anderson parties did not have standing to challenge the Board's imposition of a mitigation requirement on the Bureau has no effect on our previous discussion of the Merger Law, because the expansion landholders had standing to raise that issue. As we have noted, the expansion landholders suffered injury as a result of the Board's exclusion of the expansion lands from the place of use in the Bureau's CVP permits. In challenging that aspect of the Board's decision, they were entitled to argue that the Board should have included their lands in the place of use because the Merger Law required that result.

its independent judgment and determine whether an EIR has been completed in compliance with the statute. [Citations.] The courts afford those agencies having CEQA experience with substantial discretion in determining whether they have sufficient environmental information to satisfy the statute. In this instance, the Board indicated the environmental information concerning expansion lands was incomplete."

We review, for abuse of discretion, the Board's decision that the change EIR provided an inadequate basis for determining whether to add the expansion lands to the authorized place of use. (*See Save Our Peninsula Committee v. Monterey County Bd. of Supervisors, supra*, 87 Cal.App.4th at pp. 116-117, 104 Cal.Rptr.2d 326; *Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at pp. 1375-1376, 43 Cal.Rptr.2d 170.) We find no such abuse.

The Anderson parties assert that "[e]vidence regarding Westlands Expansion Lands was received by [the Board] throughout its administrative proceedings." As the Board observes, however, the Anderson parties fail "to point to any evidence in the record that describes with any measure of detail or specificity the nature and scope of future land and water uses that would occur if the . . . Board included expansion lands in the CVP's place of use." The Board is also correct in observing that the Anderson parties "cannot point to any evidence in the record that would demonstrate the likely environmental consequences of the inclusion of expansion lands."

In discussing the potential significant environmental impacts of approving the change petition, the change EIR explained: "Because the Proposed Project and alternatives would delineate only the general area where CVP water could be delivered and the purposes for which it may be used, site-specific impacts resulting from future CVP water deliveries to expansion area lands cannot be estimated. To the degree possible, potential impacts to the lands and environmental

resources within the CVP water contractor service areas are discussed; however, it is acknowledged that this discussion may be speculative. [¶] Additional decisions by local land use authorities and the individual CVP water contractors would be needed prior to the delivery and future use of CVP water to expansion lands outside the authorized [place of use]. Therefore, the actual places and purposes for which CVP water would be used is not known at this time, except as restricted by the individual water delivery contracts between [the Bureau] and the CVP water contractors."

In the end, the Anderson parties acknowledge that the change EIR analyzed inclusion of the expansion lands only at the programmatic level. What they appear to contend is that because the Board analyzed the expansion lands, albeit at the programmatic level, the Board was obligated to grant the Bureau's request to include the expansion lands in the place of use. We cannot agree.

The Anderson parties first suggest that the Board could not refuse to include the expansion lands within the place of use in the Bureau's CVP permits because "there was no evidence [of] any harm to a legal user of the water involved" and "no evidence that [adding the expansion lands] poses any threat to the environment." What the Anderson parties fail to appreciate, however, is that the lack of such evidence could well be due to the fact that, before the Board even began receiving evidence, it had decided to consider adding the expansion lands to the place of use only at the programmatic level, because the future land and water uses in those areas could not readily be determined and would require speculation.

The Anderson parties also contend that approval of the Bureau's change request with respect to the expansion lands was required because "[c]onfirmation of the Expansion Lands as being within the place of use of CVP water within Westlands is a step precedent to-and distinct from-actual delivery of the CVP water to the Expansion Lands." By this argument,

the Anderson parties appear to suggest that some further approval by the Board would be necessary to begin actual water delivery and the Board could have conditioned its further approval on "further site-specific environmental review, as appropriate." The Anderson parties, however, do not identify any further approval the Board would have to give for the delivery of CVP water to the expansion lands once the Board changed the place of use in the Bureau's permits to include those lands. Thus, this argument fails, and we conclude the Anderson parties have failed to show any abuse of discretion by the Board in declining to include the expansion lands within the authorized place of use in the Bureau's CVP permits based on only a programmatic review of the potential environmental impacts of that action.

For the foregoing reasons, the trial court erred in granting the petition by Westlands and the Anderson parties for a writ of mandate directing the Board to conform the places of use under the Bureau's CVP permits to include both the encroachment and expansion lands within Westlands without any mitigation requirement. Accordingly, we will reverse the judgment in *Anderson v. State Water Resources Control Board* (Super. Ct. Fresno County, 2003, No. 645385-6) and direct the trial court to enter a new and different judgment denying the petition in its entirety.

VI

Challenge To The Change EIR

In the second cause of action in their CEQA writ petition, the Central Delta parties challenged the Board's certification of the change EIR. Among other things, the Central Delta parties alleged the Board had "failed to examine potentially significant impacts of water quality and quantity in the San Joaquin River and Sacramento-San Joaquin Delta which were raised by commenting parties." They sought a writ of mandate directing the Board to set aside its certification of the change EIR and Decision 1641.

In the third cause of action in their writ petition, the Audubon Society parties offered identical allegations. As previously noted, in the trial court the Audubon Society parties did not offer any independent briefing of their own in support of their petition, but instead joined in the Central Delta parties' trial court brief.

In its statement of decision, the trial court explained that despite "an extensive menu of alleged CEQA violations" in their petition, in their briefing the Central Delta parties "limit[ed] [their] discussion to the alleged failure of the [change] EIR to analyze the impact of approval of the Bureau's change petition on salinity in the lower San Joaquin River, as well as the agency's failure to mitigate for this impact." Accordingly, the trial court deemed the other allegations abandoned.

Citing subdivision (a) of CEQA section 21177, the trial court decided the Central Delta parties had "failed to exhaust their administrative remedies" on the salinity issue. The court explained: "Central Delta and its associated entities commented on the Draft EIR on March 31, 1998. They did not raise the issue of increased salinity in the lower river due to the application of water on saline-prone encroachment lands . . . . The Court has reviewed all the comments on the [change] EIR. While other commentators discussed salinity issues in other contexts, the issue of applying water to saline-prone, Westside lands apparently was not raised by anyone before the close of the public comment period associated with this EIR, although Central Delta apparently made some mention of this narrow issue in closing briefs. The Court is of the opinion that, under the facts of this case, the mention of this issue in closing comments was insufficient to raise the issue when these same petitioners made specific and numerous comments on March 31, 1998, and failed to raise this issue."

The Central Delta parties alleged in their mandamus petition that they had exhausted their administrative remedies

by "appear[ing] before the [Board] at its hearings leading to certification of the [change EIR] and rais[ing] before the [Board] each and every point now presented to this Court and submitt[ing] evidence pertinent thereto." Similarly, the Audubon Society parties alleged that "[t]he violations of CEQA alleged herein were presented to the [Board] orally or in writing during the public comment period." The trial court determined this issue against the Central Delta and Audubon Society parties and thus never reached the merits of their challenge to the change EIR, because they had failed to establish this jurisdictional prerequisite to bringing a CEQA action in the first place.

In their opening briefs on appeal, the Central Delta and Audubon Society parties ignore the trial court's ruling that they failed to exhaust their administrative remedies with respect to their challenge to the change EIR. Only in their reply briefs, after the Board raised the exhaustion issue in its respondent's brief, do they address the issue. Accordingly, the first question is whether the Central Delta and Audubon Society parties forfeited their challenge to the change EIR by failing to address the trial court's ruling on the exhaustion issue in their opening briefs. We conclude they did.

Generally, we will not consider points raised for the first time in an appellant's reply brief, unless good reason is shown for the failure to present them earlier. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8, 265 Cal.Rptr. 788.) "'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission.'" (*Ibid.*)

Here, the Board did address the exhaustion issue in its respondent's brief; however, because the Central Delta and Audubon Society parties did not present in their opening

briefs the arguments on why (contrary to the trial court's conclusion) they had exhausted their administrative remedies, the Board did not have the opportunity to respond to those arguments. By reserving those arguments for their reply briefs, the Central Delta and Audubon Society parties thus deprived the Board of the opportunity to prepare an adequate response on the exhaustion issue.

It is true that, on review of a CEQA action, our role is generally "the same as that of the trial court" and "[t]hus, the conclusions of the superior court, and its disposition of the issues . . . are not conclusive on appeal." (*Long Beach Sav. & Loan Assn. v. Long Beach Redevelopment Agency* (1986) 188 Cal.App.3d 249, 260, 232 Cal.Rptr. 772.) In this context, however, that rule means only that we would not be bound by, or be required to show any deference to, the trial court's conclusion on the exhaustion issue. It does not mean the Central Delta and Audubon Society parties, as the appellants aggrieved by the trial court's determination that they had not exhausted their administrative remedies, were entitled to ignore the exhaustion issue in their opening briefs. Even when our review on appeal "is de novo, it is limited to issues which have been adequately raised and supported in [the appellant's opening] brief. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal. Rptr.2d 457.)

To succeed in their appeals with respect to the change EIR, the Central Delta and Audubon Society parties bore the burden of convincing us the trial court erred in denying their mandamus petitions. "The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct.*" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶ 8:15, pp. 8-4 to 8-5.) It is the appellant who bears the burden of overcoming that presumption. (*Stevens v. Owens-Corning Fiberglas Corp.*

(1996) 49 Cal.App.4th 1645, 1657, 57 Cal.Rptr.2d 525.) Where the trial court based its judgment on the determination that petitioners failed to exhaust their administrative remedies, petitioners could not simply overcome the presumption of correctness by ignoring that issue in their opening briefs.

Because the Central Delta and Audubon Society parties failed to address the exhaustion issue in their opening briefs, and because they failed to offer any reason (good or otherwise) for that failure, we conclude they forfeited their challenge to the change EIR. Accordingly, having previously rejected the other arguments of the Central Delta parties related to their CEQA writ petition, we will affirm the judgment in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 309539) in its entirety. As for the judgment in *Golden Gate Audubon Society v. State Water Resources Control Board* (Super. Ct. Alameda County, 2003, No. 825585-9), we affirm that judgment to the extent it denied the Audubon Society parties relief on their third cause of action.

VII

Prejudgment And Bias

A

Factual Background

To understand the claims of prejudgment and bias made by the Central Delta and Audubon Society parties, it is necessary to first examine more closely the joint state-federal program known as CALFED.

In December 1992, Governor Pete Wilson established the Water Policy Council (the Council), to be chaired by the Secretary of the Resources Agency, and to be comprised of the heads of eight other state agencies, including (as relevant here) the Directors of the Department of Fish and Game, and the Department of Water Resources, and the Chair of the

State Water Resources Control Board. (Governor's Exec. Order No. W-38-92 (Dec. 9, 1992).) The role of the Council was to "provide for coordination and information exchange among member agencies, boards, and departments necessary for the continued development and implementation of various components of the State's long-term, water management policy and program." (*Ibid.*)

In September 1993, the Bureau signed an agreement with three other federal agencies creating the Federal Ecosystem Directorate (Directorate) to coordinate federal resource protection and management decisions regarding the Bay-Delta.

In June 1994, the Council and the Directorate entered into an agreement known as the framework agreement "to establish a comprehensive program for coordination and communication between the Council and the [Directorate] with respect to environmental protection and water supply dependability in the" Bay-Delta. This program is known as CALFED.

The framework agreement identified the formulation of water quality standards as one of three areas in which federal and state coordination and cooperation with respect to the Bay-Delta was particularly important. The other two areas were coordination of CVP and SWP operations with regu latory requirements and pursuing long-term solutions to Bay-Delta issues. In the framework agreement, the Council and the Directorate endorsed and concurred with certain "Points of Agreement on State and Federal Processes for Setting Water Quality Standards for the Bay-Delta."

As we have previously explained, in December 1994 various representatives of the state and federal governments and certain urban, agricultural, and environmental interests signed the "Principles for Agreement on Bay-Delta Standards between the State of California and the Federal Government." This document described changes to a previous proposal for

water quality standards and operational constraints in the Delta to be adopted and implemented by the Board. On the same day the principles for agreement were signed, the Board released the first draft of its new water quality control plan for the Bay-Delta. The Board used several elements of the principles for agreement, as well other recommendations from interested parties, in preparing the draft plan.

We turn now to the more immediate factual background of the prejudgment and bias issue. In June 1998, before the commencement of the public hearing in the water rights proceeding underlying these coordinated cases, the Central Delta parties filed a "Request for Recusal" with the Board *Seeking* the recusal of any Board members or staff "who have reviewed communications or correspondence from or otherwise communicated with the Water Policy Council staff or Water Policy Council members regarding Delta Water Right matters including without limitation allocation among water right holders of the burden of meeting Bay/Delta water quality standards, restrictions on rates of export pumping, and release or alteration of the pattern of releases or use of water."

On July 1, 1998, the first day of the public hearing, the Board addressed the Central Delta parties' request. The attorney for the Central Delta parties explained they were making the recusal request because they had "been denied access to the Water Policy Council documents that [they] found went to [the] Board." In essence, as characterized by one of the Board's attorneys, the recusal request was based on alleged ex parte communications between members of the Board (or its staff) and the Council on matters at issue before the Board.

The Board's attorney then explained to the Board the provisions of the Administrative Procedure Act (Gov Code, § 11340 et seq.) governing disqualification. The attorney asked the Board members to "think about whether during pendency of this current proceeding, in other words, since the

original hearing notice was released in December of 1997 the Board Member has received any ex parte communication from the Water Policy Council regarding any matter of substance or in controversy" and to "decide whether they're aware of any reason why the [Board's Member is] biased or prejudice[d] with respect to the issues in this hearing." All of the board members then stated on the record that they had no reason to recuse themselves.

Later that day, the Central Delta parties' attorney was allowed to question two Board staff members-Jerry Johns, the assistant division chief for the division of water rights, and Walter Pettit, the executive director of the Board-on the record about meetings they had in March 1995 with parties interested in Delta water issues. He also questioned Pettit in particular about Pettit's notes from a meeting in November 1994 that Pettit organized at the Board's direction. On cross-examination, Pettit testified that the November 1994 meeting was a continuation of the Board's workshops leading to development of the 1995 Bay-Delta Plan. The discussion at that meeting related solely to the water quality objectives for the proposed plan and did not address "any kind of water rights decision."

Seven months later, on January 25, 1999, the Central Delta parties made a motion to "Establish Conditions Conducive to [Board] Impartiality." The motion proposed that the Board take five different actions, including withdrawing all Board members and staff from the Council, withdrawing from the framework agreement, and prohibiting staff members who communicated or met with members of the Council from any further participation in the water rights proceeding.

In March 1999, the Board denied the motion on the grounds that the actions the Central Delta parties requested "exceed the applicable statutory requirements, are unsupported by your pleadings, are overbroad, and are unnecessary for the purpose of maintaining impartiality."

In the thirteenth cause of action in their non-CEQA writ petition, the Central Delta parties alleged the Board failed to provide them a fair hearing and deprived them of due process of law. Among other things, they complained that the Board entered into the framework agreement with the Bureau and the Department and that the Secretary of the California Environmental Protection Agency signed the principles for agreement. They also complained that the Board's executive officer and principal staff members participated in negotiations with the parties to the principles for agreement.

The trial court rejected the Central Delta parties' claims of bias based on staff activities, concluding that "any statement by or communication to the [Board] staff is legally irrelevant, for due process purposes, absent a showing of that staff person's direct involvement in the decisionmaking process resulting in [Decision] 1641." The court went on to note that the Board staff members examined by the Central Delta parties "indicated that their job functions required interactions with other agencies and water users, but they disclaimed any substantive communications with Board members during the hearing process."

The trial court also rejected the claims of bias based on "certain official commitments made by the Board chair or the Board's superior agency." The court concluded that the provisions of the framework agreement were not "sufficient to suggest either a prejudgment of adjudicative facts or an actual or perceived bias by the Board to rule a certain way on the merits of Bay-Delta water quality standards and water user responsibilities." The trial court further concluded that the commitment of the Secretary of the California Environmental Protection Agency to the principles for agreement could not be attributed to the Board.

B

Legal Analysis

On appeal, the Central Delta parties reiterate all of their claims of prejudgment and bias.[65] Like the trial court, we conclude those claims are without merit.

"The contention that a fair hearing requires a neutral and unbiased decision maker is a fundamental component of a fair adjudication . . . ." (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1234, 97 Cal.Rptr.2d 467.) Under the Administrative Procedure Act and the Board's regulations, when conducting an evidentiary hearing to determine facts pursuant to which the Board will formulate and issue a decision, the members of the Board are subject to disqualification for bias, prejudice, or interest in the proceeding. (Gov Code, § 11425 40, subds.(a), (c); Cal Code Regs , tit 23, § 648, subd. (b).)

"Bias and prejudice are not implied and must be clearly established. A party's unilateral perception of bias cannot alone serve as a basis for disqualification. Prejudice must be shown against a particular party and it must be significant enough to impair the adjudicator's impartiality. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice." (*Gray v. City of Gustine* (1990) 224 Cal.App.3d 621, 632, 273 Cal.Rptr. 730.)

"[A]dvance knowledge of adjudicative facts that are in dispute . . . does not disqualify the members of an adjudicatory body from adjudicating a dispute . . . . [T]here must be . . . a commitment to a result (albeit, perhaps, even a tentative commitment), before the process will be found violative of

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[65] The Audubon Society parties did not offer any allegations of bias or prejudgment in their writ petition. On appeal, however, they offer arguments in support of the Central Delta parties on this issue. We address their arguments together with those of the Central Delta parties.

due process." (*BreakZone Billiards v. City of Torrance, supra,* 81 Cal.App.4th at p. 1236, 97 Cal.Rptr.2d 467.)

Initially, the Central Delta parties contend that evidence of the Board's prejudgment of issues in this water rights proceeding can be found in the framework agreement, which was signed by the chair of the Board in his role as one of the members of the Council. They first cite the following provision from the agreement: "We agree that it is essential for the State and Federal agencies with regulatory and resources management responsibilities in the Bay-Delta Estuary to reach consensus, consistent with applicable procedural limitations, on the appropriate level of protection to be achieved for the Bay-Delta Estuary." According to the Central Delta parties, this provision reflects the Board "agree[ing] in advance of the judicial proceeding that [it] will not impose any burden for protection of the Bay-Delta that is not agreed to by the State and Federal Agencies who are some but not all of the parties to the adversary proceedings."

The Central Delta parties' perception of bias from this part of the framework agreement is misplaced. It must be recalled that the framework agreement was signed in June 1994, when the Board was in the midst of a *rulemaking* proceeding to revise the water quality objectives for the Bay-Delta. In referring to "reach[ing] consensus . . . on the appropriate level of protection," the framework agreement was plainly referring to a consensus on what the water quality objectives should be, not a consensus on the entirely separate question of how responsibility for meeting those as yet—undetermined objectives should be allocated in a future water rights proceeding. The Board chair's recognition of the importance a consensus in a rulemaking proceeding on the level of protection to be achieved in setting water quality objectives for the Bay-Delta, through his signing of the framework agreement, does not evidence bias or prejudice on the question of who should be held responsible for meeting those

objectives, which was to be addressed in the later adjudicative proceeding.

To the extent the water quality objectives adopted by the Board in the rulemaking proceeding that resulted in the 1995 Bay-Delta Plan included export limits that only the Bureau and the Department could be held responsible for meeting, this fact provides no basis for establishing prejudgment or bias on the part of the Board in the water rights proceeding underlying these consolidated cases. If, as it appears, the Central Delta parties are concerned the Board colluded with the Bureau and the Department in setting limits on exports, that was a challenge they needed to raise to the 1995 Bay-Delta Plan itself. They cannot raise such a challenge now, in a water rights proceeding where the Board did nothing more than implement the water quality objectives embodying the export limits it had previously set and which were unchallenged at that time.

The Central Delta parties also rely on a provision from the "Points of Agreement on State and Federal Processes for Setting Water Quality Standards for the Bay-Delta" that were part of the framework agreement to demonstrate prejudgment and bias on the part of the Board. That provision reads: "The [Board] will seek agreement with the California Department of Water Resources and the U.S. Department of the Interior [i.e., the Bureau] to operate the SWP and CVP to make an equitable contribution to meeting the standards, starting in calendar year 1995, while the [Board] is working on a water rights decision to equitably allocate responsibility among water right holders in the Bay-Delta watershed." According to the Central Delta parties, "[c]ertainly such an agreement evidences prejudgment and bias."

We cannot agree. In effect, this provision did nothing more than evidence the Board chair's concurrence that the Board would "seek agreement" with the Department and the Bureau to make an "equitable contribution" to meeting the Board's

new water quality objectives on an interim basis, "while the [Board wa]s working on a water rights decision to equitably allocate responsibility among water right holders in the Bay-Delta watershed" for meeting those objectives on a more permanent basis. The Central Delta parties fail to provide any rational explanation of how this shows prejudgment and bias on the part of the chair in the water rights proceeding underlying these coordinated cases. According to them, this provision "constrains the subsequent proceedings," but we find no logical basis for that conclusion. Even assuming the Board chair, alone or in conjunction with other Board members, did "seek" such an agreement, the Central Delta parties utterly fail to explain how those efforts constrained them from fairly allocating responsibility for meeting the water quality objectives in the subsequent water rights proceeding. The Central Delta parties' contention that this provision constituted a "mere agreement . . . to negotiate rather than impose the result" is simply an unreasonable reading of the provision.

In an attempt to bolster their argument, the Central Delta parties refer to a comment made by the Department on the Board's draft decision in the water rights proceeding, in which the Department contended "it would be inconsistent with . . . the CALFED process to impose a regulatory responsibility upon the projects, again, even on an interim basis," "[u]ntil the Board is prepared to fully allocate responsibility for meeting the [1995 Bay-Delta Plan objectives] among water users." Whatever this comment may show about *the Department's* view of the framework agreement and of the Board's adjudicative responsibilities, it is of no value in meeting the Central Delta parties' burden to show "concrete facts demonstrating bias or prejudice" (*Gray v. City of Gustine, supra*, 224 Cal.App.3d at p. 632, 273 Cal.Rptr. 730) on the part of the Board and its members.

The Central Delta parties next contend that prejudgment and bias are shown by the principles for agreement, which "purports to bind the [Board], in advance of the proceedings." As the trial court noted, however, the Board "is not a signatory to this agreement. The only question can be whether the commitment by the Secretary of the California EPA is attributable to, and thereby biases, the [Board]. The [Board] is contained within the California EPA for administrative convenience. The Secretary does not participate in or review the Board's decisions. No evidence has been adduced indicating the Secretary pressured the Board or the Board feared adverse consequences if it failed to rule in a certain way."

The Central Delta parties offer no response to these observations, instead turning to the argument that "principal [Board] staff members participated in the private negotiations and [acted] as a conduit for communications to the [Board] members" about the principles for agreement. The only support for that argument is the meeting the Board's executive director, Walter Pettit, acknowledged organizing at the Board's direction in November 1994, and Pettit's notes of that meeting. What the Central Delta parties ignore, however, is Pettit's testimony that the November 1994 meeting was a continuation of the Board's workshops leading to development of the 1995 Bay-Delta Plan, which related solely to the water quality objectives for the proposed plan and did not address "any kind of water rights decision." The Central Delta parties fail to show how a Board staff member's arrangement of and participation in a meeting aimed at developing water quality objectives for the Bay-Delta demonstrate bias or prejudice on the part of the Board members five years later in allocating responsibility for meeting the objectives that were eventually adopted.

In summary, we agree with the trial court that the Central Delta parties' claims of prejudgment and bias are entirely without substance. Accordingly, the trial court did not err in

rejecting the thirteenth cause of action in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502).[66]

DISPOSITION

The judgment in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 309539) is affirmed.

The judgment in *Anderson v. State Water Resources Control Board* (Super. Ct. Fresno County, 2003, No. 645385-6) is reversed, and the trial court is directed to enter a new and different judgment denying the petition for writ of mandate and complaint for declaratory relief.

The judgment in *Central Delta Water Agency v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311502) is modified to provide that a writ of mandate shall issue commanding the Board to commence further appropriate proceedings to either assign responsibility for meeting the Vernalis pulse flow objective and the southern Delta salinity objectives or to modify those objectives. As modified, the judgment is affirmed.

The judgment in *County of San Joaquin v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311499) is affirmed.

The judgment in *Golden Gate Audubon Society v. State Water Resources Control Board* (Super. Ct. Alameda County, 2003, No. 825585-9) is reversed, and the trial court is directed to enter a new and different judgment: (1) granting the petition for writ of mandate on the ground that the Board's failure to implement the Vernalis pulse flow objective in the

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[66] The Central Delta parties and the Board have both requested that we take judicial notice of various documents that we have not had occasion to refer to previously. Inasmuch as we have found none of those documents pertinent to our decision herein, we deny those requests.

1995 Bay-Delta Plan while the San Joaquin River Agreement is in effect constituted an abuse of discretion; and (2) denying the petition on all other grounds. The new judgment shall order the issuance of a writ of mandate commanding the Board to commence further appropriate proceedings to either assign responsibility for meeting the Vernalis pulse flow objective or to modify the Vernalis pulse flow objective.

The judgment in *Santa Clara Valley Water District v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 2003, No. 311549) is affirmed.

The judgment in *Westlands Water District v. State Water Resources Control Board* (Super.Ct.Sac.County, 2003, No. 00CS00603) is affirmed.

The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a).)

We concur: SCOTLAND, P.J., and CANTIL-SAKAUYE, J.

APPENDIX A

BEST AVAILABLE COPY

APPENDIX B

State Water Project Facilities
PACIFIC OCEAN
LEGEND
Rivers
Lakes
State Water Project Aqueducts
San Luis Canal
Banks Pumping Plant
Joint Use Facility
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20
40 mi
SCALE

APPENDIX B

IN THE COURT OF APPEAL OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

[Filed March 2, 2006]

No. C044714
Sacramento County
No. JCCP4118
00CS00603
311502
311549
311499
309539
8255859
6453856

STATE WATER RESOURCES
CONTROL BOARD CASES

BY THE COURT:

Appellant Westlands Water District's petition for rehearing is denied.

Dated: March 2, 2006

SCOTLAND, P.J.

cc: See Mailing List

APPENDIX C

IN THE SUPREME COURT OF CALIFORNIA
Court of Appeal
Third Appellate District

[Filed May, 17, 2006]

No. C044714
S141957

STATE WATER RESOURCES
CONTROL BOARD CASES

Petitions for review DENIED.

George
Chief Justice

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

Case No. JC 4118

STATEMENT OF DECISION
Honorable Roland L. Candee
Coordination Trial Judge

May 5, 2003

COORDINATED SPECIAL PROCEEDING SPECIAL TITLE (Rule 1550(b))

STATE WATER RESOURCES CONTROL BOARD CASES

COORDINATED ACTIONS:

Anderson et al. v. SWRCB et al.
(Fresno County Super Court, No. 645385-6)

Central Delta Water Agency et al. v. SWRCB et al.
(San Francisco County Superior Court, No. 309539)

Glenn-Colusa Irrigation District et al. v. SWRCB
(Sacramento Superior Court, No. 00CS00201)

San Luis Water District v. SWRCB
(Merced County Superior Court, No. 143845)

Central Delta Water Agency et al. v. SWRCB et al.
(San Francisco County Superior Court, No. 311502)

County of San Joaquin et al. v. SWRCB et al.
(San Francisco County Superior Court, No. 311499)

Golden Gate Audubon Society et al. v. SWRCB et al.
(Alameda County Superior Court, No. 825585-9)

Pacific Coast Federation of Fishermen's Associations et al. v. SWRCB et al.
(San Francisco County Superior Court, No. 311507)

Santa Clara Valley Water District v. SWRCB
(San Francisco County Superior Court, No. 311549)

State Water Contractors et al. v. SWRCB
(Sacramento Superior Court, No. 00CS00602)

Westlands Water District v. SWRCB et al.
(Sacramento Superior Court, No. 00CS00603)

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* * * *

SWP points of diversion in the Delta; habitat improvements in the Central Valley; and measures to improve water supply reliability for users dependent on the Delta. Separate volumes of the draft EIR were issued in 1997 and 1998. The final EIR was completed in November 1999.

The Central Delta petitioners generally contend that the EIR failed to study important environmental impacts likely to result from the Board's assignment of salinity objectives at Vernalis and the interior Delta to the CVP and SWP. Central Delta rhetorically asks where the water will come from to meet this objective and what will be the foreseeable environmental consequences of providing that water. Central Delta's position is without merit.

The EIR studies a range of flow objective alternatives. The flow objectives include "salinity objectives in the Delta that occasionally control Delta outflow" and "the salinity objectives on the San Joaquin River at Vernalis." FINAL IMPLEMENTATION EIR at II-16 (AR/1486/II-16). The entirety of chapter V of the EIR addresses the water supply impacts of these flow-dependent measures. In analyzing Alternative 8, which is the closest alternative to D-1641 (since it assumes the implementation of the San Joaquin River Agreement), the EIR discusses the water supply impacts of the alternative on Sacramento Basin sources, New Melones Reservoir (including carryover storage), the San Joaquin tributaries group, New Don Pedro Reservoir, Lake McClure, CVP and SWP exports, and water transfers. *Id.* at V-21. A complete evaluation of the environmental effects of implementing the flow and operational objectives of the plan is set forth in the 161 pages of Chapter VI of the EIR. All this discussion is sufficiently complete to describe the environmental effects of providing water to meet the flow objectives of the plan, including water source impacts.

Applying the required CEQA substantial evidence standard, the SWRCB did not abuse its discretion in the preparation of its EIR. The SWRCB proceeded in the manner required by law and its decisions concerning EIR preparation are supported by substantial evidence.

D. Place of Use Issues

The federal authorization of the Central Valley Project includes lands that are outside the place of use limitations described in the existing SWRCB-issued CVP water right permits. In some cases, CVP water has been delivered to these lands ("encroachment lands"). In other cases, lands having never received CVP water are still authorized to do so under the federal project authorizations ("expansion lands").

The SWRCB approved the Bureau of Reclamation's petition, on the condition of mitigation, to change the place of use to include encroachment lands. Again, these are lands presently receiving CVP water although they are located outside the permitted place of use. The Board did not decide that portion of the Bureau's petition concerning expansion lands, those within the federally authorized CVP service area but outside the permitted place of use and never served by CVP water. The Board indicated the environmental review was insufficient to reach a decision concerning these expansion lands. *See* V(D)(5), *infra*. The Westlands and Santa Clara Valley petitioners, both CVP contractors, contest these decisions. The Central Delta petitioners also object, arguing they will suffer injury as legal users from these changes.

These change petitions were filed under Water Code section 1701 *et seq*. Change procedures are quasi-judicial, adversarial proceedings where the burden of going forward and the burden of persuasion shift back and forth between a change petitioner and any protestor. Under the law in effect at the time the SWRCB issued D-1641, and even after amend-

ments in 2001, the applicable criteria set forth in section 1702 is as follows: "Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved." Thus, the petitioners must make a *prima facie* showing that the proposed change will not injure other legal users of water. The burden then shifts to any protestant to present the information "reasonably necessary to determine if the proposed change will result in injury to the protestant's exercise of its water right." CAL. WATER CODE § 1703.6(c)(3); id. §1703.5; cf. Supplement to Revised Notice of Public Hearing for Phase 2B at 3 (April 20, 1999) (AR/630) (criteria for proceedings under CAL. WATER CODE §§ 1707(b)(2) & 1736). The burden of persuasion ultimately falls to the applicant to satisfy the Board that the requirements of section 1702 are met.

This case is complicated by the Bureau of Reclamation, the petitioner, apparently relying on federal sovereign immunity and not being before the Court. *See* Order (Feb. 9, 2001) (denying motion to dismiss for failure to join an indispensable party); Order (Feb. 26, 2001) (relieving petitioners of the obligation of continuing service of pleadings upon the United States). The record is silent as to whether the Bureau is pleased, displeased, or has simply acquiesced in the Board's decision. The United States is entitled to exercise its sovereign prerogatives as it sees fit, but the Court notes to its regret that the government was not present to assist the Court in determining important reclamation law principles including the ownership and management of reclamation project water rights and the relationship between environmental laws such as the federal Endangered Species Act and project water rights.

The Bureau's contractors, Westlands and Santa Clara Valley Water District, have registered their displeasure; but

the initial question is whether they have standing to do so. Specifically, in the absence of the Bureau, do these petitioners have standing to complain about the Board's imposition of a mitigation requirement for the approach of the place of use petition concerning the encroachment lands and the Board's failure to reach a final decision concerning expansion lands? This issue touches on a question well-stated in a recent law-review, "Whose water is it anyway?"[7]

The initial question here is whether Westlands and Santa Clara Valley, as contractors receiving Central Valley Project water, have standing as "legal user[s] of the water involved" under section 1702, to challenge the Board's disposition of the Bureau of Reclamation's place of use petition. Because "legal user" is ambiguous on its face in this water law context, and the section's meaning has not been definitively resolved by the appellate courts of this state, it is necessary to examine the legislative history of this language.

1. Original Meaning of "Legal User"

The inquiry into the original meaning of "legal user" requires a return to early California water law history and the tension between the prior appropriation and riparian doctrines, discussed earlier in part IV(B), *supra*. As there mentioned, the legislature in 1872 amended the Civil Code to codify many of the appropriative customs. While the legislation indicated that "[t]he rights of riparian proprietors

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[7] The answer suggested by the author is complex and involves a consideration of these factors: (1) how project ownership is split among the federal government, state, district or association, and landowners; (2) variation in the rights and responsibilities of these four actors by state, by project, and within projects; and (3) the specific context within which the ownership question arises. Reed D. Benson, *Whose Water is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 367 (1997). Thus, issues of standing and ownership involve a calculus of state and federal law, water supply contracts, and, as we shall see, general concepts of trust law.

are not affected by the provisions of this title," Civil Code section 1422 (since repealed), the legislation appeared to protect both appropriators and riparians in the event a change in point of diversion was contemplated by an appropriator. Section 1412 provided, "The person entitled to the use may change the place of diversion, *if others are not injured by such change*, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made." Act of Mar. 21, 1872, *codified at* CAL. CIV. CODE § 1412 (1912) (since repealed) (emphasis added).

By 1911, under-utilized riparian and "cold-storaged" appropriative rights led to the study and recommendations of the California State Conservation Commission, chaired by former governor George Pardee. Indeed, popular sentiment against wasteful riparian uses was so strong that the Commission recommended the conversion of riparian into appropriative rights. *See A.E. Chandler, The "Water Bill" Proposed by the Conservation Commission of California*, 1 CALIF. L. REV. 148 (1912).

The Commission's water law recommendations were enacted by the legislature in 1913 and approved by the voters in 1914. 1913 Stat. 1012 ch. 586 (June 16, 1913). The legislation went to great lengths to void what were perceived to be wasteful water practices. Water tied up under speculative appropriations was declared to be unappropriated. Riparian uses were conclusively abandoned if water was not applied to a useful or beneficial use on land for ten consecutive years. *Id.* at § 11.[8] A permit issued by the newly formed State Water

---

[8] Technically, the consequence of section 11's conclusive presumption is one of subordination. If water is not applied on riparian land for "beneficial and useful purposes" for ten consecutive years, the water is presumed not needed on the land and declared unappropriated. Apparently, riparian use could commence but with no seniority rights against appropriators. *See In re Waters of Long Valley Creek Stream System*, 25

Commission became the exclusive method for new appropriations of surface water.

California was not alone in facing the transitional issues generated by this type of legislation although the situation was complicated by the state's continued recognition of a hybrid riparian-appropriative system. Other state legislatures addressed the same problem of protecting other water right holders who did not have appropriative permits from an administrative agency, including pre-code appropriative rights, nonappropriative groundwater, and small domestic and stockwatering uses. For example, in Arizona, the change statute protects "other vested rights." ARIZ. REV. STAT. § 45-153(A) (2002).

Several sections of the 1913 law are instructive on the meaning of "legal user." Section 10, concerning applicants for appropriative rights, provides as follows:

> The state water commission shall have authority to, and may, for good cause shown, upon the application of any appropriator or *user of water under an appropriation made and maintained according to law prior to the passage of this act*, prescribe . . . . [a period of reasonable diligence]. (emphasis added).

In this context, the term "user" refers to someone who commenced an appropriation under the law prior to 1913. It may also be read as distinguishing between a "user" who began an appropriation under the old law and an "appropriator" under the new law.

Cal. 3d 339 (1979). Section 11 was subsequently declared unconstitutional. T*ulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489 (1935).

Section 16 expands on the change of point of diversion language in the 1872 statute and provides the basis for present-day section 1702:

> If any permittee or licensee, or the heirs, successors, or assigns of any permittee or licensee, desire to change the point of diversion . . . such applicant must establish, to the satisfaction of the state water commission, and such commission must so find, that such change in the place of diversion will not operate to the injury of any other appropriator or legal user of such waters before permitting such change in the place of the diversion.

This section, by introducing the modifier "legal," suggests a slightly different concept than the one contained in section 10. In the context of this anti-speculative, anti-riparian statute, the most plausible meaning of "legal user" is a person (a) who appropriated under prior law and who uses water for beneficial purposes or is making a diligent effort to do so; or (b) who, as a riparian, is applying water for "useful and beneficial purposes" upon riparian land, in a manner that avoids the conclusive presumption of relinquishment in section 11.

For our purposes, what is most striking about this 1913 legislation is its total silence about irrigation districts or other suppliers, or the members, shareholders, or customers of those entities. Samuel C. Wiel, the dean of California water law at the time, offers a contemporaneous explanation. Samuel C. Wiel, *Determination of Water Titles and the Water Commission Bill*, 2 CAL. L. REV. 435 (1914). In discussing the water rights determination features of the 1913 legislation, Wiel questions whether "consumers" of water carriers or companies will be adjudicated title as the result of the new water rights determination process. He concludes that California is following the Colorado approach and that individual farmers should not expect a water deed from the state representing their water. *Id.* 448.

In a separate article that same year, Wiel discusses the water rights of water service corporations and their consumers and summarizes California law as holding "that after public use attaches [to a water delivery system] the whole title must remain in the distributor, and that the consumer under the canal can have no 'water-right' as a share in the system." Samuel C. Wiel, *Water Titles of Corporations and Their Consumers*, 2 CAL. L. REV. 273 (1914). He also reasons that, since the state water commission is not going to adjudicate priorities along a canal, there is no basis to administer the rights and no reason to consider these users as title holders. *Id.* 282-83. Responding to this article, Morris Bien, an influential official with the U.S. Reclamation Service, indicated his understanding of the irrigation "provider-user" situation under the Reclamation Act. He describes the Reclamation Act as not specifically providing a water right for landowners. In exchange for their project repayments, "the water-users will acquire a usufructuary interest *in the canal system* . . . ." *Editorial Note*, 2 CAL. L. REV. 481 (1914) (emphasis added).

While the legislature has modified and recodified section 16 of the 1913 law, nothing indicates that the legislature has sought to modify the meaning of "legal user." Based on this review, the Court concludes that the legislature, in using the concept "legal user," did not intend to include those persons who use water provided under contract with a water supplier entity, such as the Central Valley Project or State Water Project. Nothing in the text or legislative history suggests that contractors of the Reclamation Service were to be protected as legal users. The Anderson petitioners, Westlands, and Santa Clara Valley Water District are not legal users within the meaning of section 1702. *Cf. Fort Hall Water Users Ass'n v. United States*, 921 P.2d 739 (Idaho 1996) (water users within reclamation project lacked standing to object to Indian water rights settlement in context of general stream adjudication).

2. Trust Theory and Standing

In addition to the plain meaning of statute argument, rejected above by the Court, Westlands offers "appurtenancy," "special relationship," and "trust" arguments supporting its claim of protection as a legal user of water.

The appurtenancy argument appears to suggest that Westlands' landowners become legal users of water because the water, under certain code provisions and prior Board decisions, is affixed to their land and they are the ones who actually put water to beneficial use. Indeed, the appurtenancy doctrine was an important feature of the Reclamation Act (section 8 provides, "the right to the use of water . . . shall be appurtenant to the land irrigated"), but its importance has been eroded by subsequent federal laws and the incorporation of state laws into subsequent federal reclamation project authorizations. *See Brian Gray et al., Transfers of Federal Reclamation Water: A Case Study of California's San Joaquin Valley*, 21 ENVTL. L. 911, 942-43 (1991).

Fundamentally, however, the appurtenancy doctrine is a restraint on outof-project transfers of project water and not a basis for standing in litigation involving the Bureau's water permits. Regardless of whether project water is appurtenant to certain lands, the Bureau is still the appropriator and the named permittee under the permit or decision identifying those lands as the place of use. An injured landowner with appurtenancy claims may have contractual remedies in the event of shortage. A homeowner in the Santa Clara Valley service area might have received domestic water for 50 years and have contractual or other legally protectable "appurtenancy" expectations of continued service. Neither that homeowner nor a Central Valley irrigator, on the basis of appurtenancy claims alone, has standing to claim injury in change proceedings before the Board or before this Court.

Westlands indicates that the Bureau-contractor relationship has been described as a trust relationship, citing both federal and state cases. Three U. S. Supreme Court cases support the proposition, stated in *Nevada v. United States*, 463 U.S. 110, 126 (1983), that "[o]nce these lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *See also Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

While the Supreme Court repeatedly speaks of a trustee-type relationship, it never clarifies whether this interpretation is required by federal law or the state law in which the particular project is located. In *Nebraska*, the Court says, "Appropriation was made not for the use of the government, but, under the terms of Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract . . . , the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works." 325 U.S. at 613-14. This phrasing suggests that the trust relationship results from both the contract and federal law (since "Reclamation Act" and "the law" appear in the same sentence). However, the Court in *Nevada* is somewhat more precise and appears to tie the trust concept to the intersection of the pertinent reclamation contract and state law. 463 U.S. at 126 ("As in Ickes v. Fox and Nebraska v. Wyoming, the law of the relevant state and the contracts entered into by the landowners and the United States make this point [beneficial ownership in landowners] very clear."). The Supreme Court appears to implicitly prefer an interpretation that state law applies to characterize the government-landowner relationship.

The SWRCB has often referred to a trust relationship in its permits; but, as a matter of California law, the trust concept has been flatly discredited by our supreme court in *Ivanhoe Irr. Dist. v. All Parties*, 53 Cal. 2d 692, 715-16 (1960) ("Thus the trust theory is not the law of this case, is dicta, and for that reason should not be construed as a statement of the law of California.").

If we did assume that Bureau-contractor relationship is that of a trust, what would be the implications for these proceedings? First, the legislature used term "legal user" which, in the context of trust law, would mean the trustee. If the legislature had intended to allow contractors to object to change proceedings, it could have more clearly referred to "user;" "other" person, as in the 1872 statute; or "legal or beneficial user" that in trust law would include both the trustee and the beneficiary.

Second, when we consult general principles of trust law, the beneficiary would have limited opportunities to participate in these proceedings. The trustee has general management powers including the power to sue at law or equity, participate in other legal proceedings, and compromise claims involving the trustee property so long as the trustee exercises reasonable prudence. See RESTATEMENT (SECOND) OF TRUSTS § 280 (Actions by Trustee) & § 192 (Power to Compromise, Arbitrate and Abandon Claims); see also CAL. PROB. CODE § 16249 (West 2002) (trustee has power to prosecute and defend actions). In the event the beneficiary believes the trustee has failed to act prudently, the beneficiary can maintain a suit in equity, *inter alia*, to compel the trustee to perform its trust duties, to redress a breach of trust, or to appoint a receiver to assume possession of trust property. RESTATEMENT (SECOND) OF TRUSTS at § 199 (Equitable Remedies of Beneficiary) & § 205 (Liability in Case of Breach of Trust). Other jurisdictional questions aside, this case is not a trust-based equitable proceeding.

Even if the United States had acted as a trustee in petitioning the SWRCB to change the place of use (akin to a compromise of a claim), the contractors cannot step into the Bureau's shoes to appeal that outcome. Their remedy is through their trust relationship with the Bureau. *See also Saks v. Damon Raike & Co.*, 7 Cal. App. 4th 419, 430 (1st Dist. 1992) (beneficiaries do not have the capacity to sue third parties concerning issues that are internal to the trust; such issues are properly before the probate department of court). The contractors often characterize the water right permits held by the Bureau as contracts between the SWRCB and the Bureau. If this is the case, the Restatement (Second) supports the conclusion that Westlands and the other contractors have no direct right to enforce these permits as contractual documents. RESTATEMENT (SECOND) OF TRUSTS § 218, Comment (c) ("If a contract right is held in trust, the beneficiary cannot maintain an action at law against the promisor.").

Thus, even on the basis of a trust interpretation, this Court concludes that when the Bureau has petitioned the SWRCB concerning some aspect of the water right held in its name but benefiting contractors or landowners, the contractors and landowners cannot impeach or challenge the outcome of that proceeding in a subsequent appeal or writ proceeding. The beneficiaries' remedy is directly against the trustee, and certainly such remedies against the United States may be more limited than against a private trustee. *See* RESTATEMENT (SECOND) OF TRUSTS § 95 (United States or State as Trustee).

A beneficiary's position may be enhanced in limited situations if the harm is caused by a third party. Under Restatement (Second) section 281, "[I]f the beneficiary is in possession of the subject matter of the trust, he can maintain such actions [at law] against the third person as a person in possession is entitled to maintain." Thus, it is arguable that a contractor of the Bureau may sue in its own name to prevent an unlawful diversion by another water user, so long as the

contractor has been using (has been "in possession") of the water. This possibility appears to have been recognized by the Board when it amended D1641 to provide that the "legal user" requirement does not preclude water service contractors from protesting changes to existing project water rights or applications for new rights or from filing protests based upon injury to the water right holder whom they rely on for deliveries under their water service contracts. AR/0770/143. This provision, however, contemplates actual harm and does not provide a basis for allowing contractors to participate here on the assumption of future harm.

Restatement (Second) section 282 allows the beneficiary to sue both the trustee and third person in equity when the trustee improperly refuses to sue a third person. The section also allows the beneficiary to sue the third party alone in equity when the trustee cannot be subjected to the jurisdiction of the court or cannot be found. This section might be invoked if the Bureau failed to take action against an unlawful diverter, and the Bureau could not be subjected to state court jurisdiction, thereby allowing the beneficiary to sue the unlawful diverter separately in equity. This proceeding, however, does not involve allegations or evidence of actual harmful diversions. This case involves the propriety of the SWRCB's water permitting decisions. *See also Saks*, 7 Cal. App. 4th 419, 427-28, 431-32 (beneficiary's action is against trustee in equity; may join third parties only to prevent loss or prejudice; "The substantive basis for the real party in interest rule is to prevent just this kind of multiplication of lawsuits arising from the same facts, in order to protect potential defendants from the harassment, vexation, and expense of having to meet several lawsuits from different claimants involving the same claim or demand . . . .").

In summary, trust law interpretations of the water provider-contractor relationship are generally disfavored by the California courts. Even if trust law principles applied, they would

not afford the contractors a basis to challenge the permits issued to their supplier under the facts of these cases.

3. Merger Statute

The Anderson petitioners request relief based on a state legislative enactment, the so-called Merger Statute, CAL. WATER CODE §§ 37800-37856.

* * * *

VI. CONCLUSION AND ORDER

The Court rules as follows concerning the specific allegations contained in the various petitions:

- Except as otherwise indicated, the State Water Resources Control Board's decision approving the Bureau of Reclamation's petition for changes in the places and purposes of use of its Central Valley Project permits and licenses is SUSTAINED, as against petitioners' challenges, by a finding of substantial evidence in the administrative record and the Court's determination that the approval is otherwise in accordance with law.

- The Anderson petitioners' request for a writ of mandate concerning the effect of the Merger Statute is GRANTED. A writ of mandate shall issue directing the SWRCB to conform the places of use under the Bureau of Reclamation's Central Valley Project permits to include both the encroachment and expansion lands within the Westlands Water District. The Board shall not require mitigation for this ministerial confirmation.

- Petitioners' challenges to those provisions of D-1641 approving the Vernalis Adaptive Management Plan and San Joaquin River Agreement are SUSTAINED, as not fully satisfying the flow-dependent objectives of the 1995 Plan for the San Joaquin River. A writ of

mandate shall issue remanding this portion of D-1641 to the SWRCB for further proceedings consistent with this decision, i.e., fully assign responsibility for meeting all of the flow-dependent objectives or modify the 1995 Plan objectives. To allow for certainty while the SWRCB responds to any writ issued by this Court concerning flow objectives, the parties are hereby ordered to comply with any and all obligations to meet flow objectives to the same extent as if D-1641 had been fully validated by this Court until further order by the SWRCB or this Court.

- The SWRCB's decision approving the California Department of Water Resources' and Bureau of Reclamation's petitions for a joint point of diversion (accomplished by modification of the points of diversion contained in their respective State Water Project and Central Valley Project permits and licenses) is SUSTAINED, as against petitioners' challenges, by a finding of substantial evidence in the administrative record and the Court's determination that the approval is otherwise in accordance with law.

- The Board's approval and incorporation of certain provisions of the Mokelumne River Agreement in D-1641 is SUSTAINED, as against petitioners' challenges, by findings of substantial evidence in the administrative record and the Court's determination that the approval is otherwise in accordance with law.

- Except as to any mitigation requiring replacement habitat for land conversions attributable to encroachment or expansion lands in the Westlands Water District, the Implementation EIR and Place of Use EIR are SUSTAINED, as against petitioners' challenges, by findings of substantial evidence in the administrative record and the Court's determination

that the EIRs were otherwise prepared in accordance with law.

- The SWRCB's decision as to the narrative salmon doubling objective is SUSTAINED, as against petitioners' challenges, by findings of substantial evidence in the administrative record demonstrating that D-1641 supports and advances the narrative goal of doubling salmon survival, and the Court's determination that the SWRCB's decision as to this objective is otherwise in accordance with law.
- Except as otherwise indicated in this decision, D-1641 is SUSTAINED, as against petitioners' challenges, by findings of substantial evidence in the administrative record and the Court's determination that the decision is otherwise in accordance with law.

Where petitioners have raised legal issues requiring *de novo* review by the Court (including legal requirements for preparation of the EIRs), the Court has independently reviewed these allegations and now rules against petitioners on these issues. Furthermore, the Court finds no violation of federal and state constitutional guarantees, particularly those pertaining to due process and the reasonable use of water. The Court finds no violation of the public trust doctrine. The Court finds no violation of various California statutes commonly known as "area-of-origin protections" or of the federal Clean Water Act.

The Court finds no merit to any of the estoppel claims in any of the petitions, finding that there have been no facts established in the record of these cases that would support any such estoppel finding.

Within thirty days, the Attorney General shall prepare and submit a proposed judgment and, where applicable, a proposed writ of mandate to the Court, for each of the coordinated cases, approved as to form by the necessary peti-

tioners. The Court reserves jurisdiction over all matters to the extent necessary to ensure compliance with this Court's orders. It is so ORDERED.

DATED this 5th day of May 2003

/s/ Roland L. Candee
ROLAND L. CANDEE
Judge of the Superior Court
Coordination Trial Judge

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

[Filed JUN 19, 2003]

Case No. JC 4118
(Sacramento County Superior Court,
Case No. 00CS00603)

JUDGMENT IN
WESTLANDS WATER DISTRICT v. SWRCB
Honorable Roland L. Candee
Coordination Trial Judge

COORDINATED SPECIAL PROCEEDING
SPECIAL TITLE (Rule 1550(b))

STATE WATER RESOURCES CONTROL
BOARD CASES

COORDINATED ACTIONS

Anderson, et al. v. SWRCB, et al.
(Fresno County Superior Court, No. 645385-6)

Central Delta Water Agency, et al. v. SWRCB, et al.
(San Francisco County Superior Court, No. 309539)

Glenn-Colusa Irrigation District, et al. v. SWRCB
(Sacramento County Superior Court, No. 00CS00201)

San Luis Water District v. SWRCB
(Merced County Superior Court, No. 143845)

Central Delta Water Agency, et al. v. SWRCB, et al.
(San Francisco County Superior Court, No. 311502)

County of San Joaquin, et al. v. SWRCB, et al.
(San Francisco County Superior Court, No. 311499)

Golden Gate Audubon Society, et al. v. SWRCB, et al.
(Alameda County Superior Court, No. 825585-9)

Pacific Coast Federation of Fishermen's Associations, et al. v. SWRCB, et al.
(San Francisco County Superior Court, No. 311507)

Santa Clara Valley Water District v. SWRCB
(San Francisco County Superior Court, No. 311549)

State Water Contractors, et al. v. SWRCB
(Sacramento County Superior Court, No. 00CS00602)

Westlands Water District v. SWRCB, et al.
(Sacramento County Superior Court, No. 00CS00603)

This matter came before this Court on August 5, 27-28, 2002, for a hearing on the merits. Thomas W. Birmingham and Daniel J. O'Hanlon appeared on behalf of Petitioner Westlands Water District. Clifford T. Lee and Mark W. Poole, Deputy Attorneys General, appeared for the Respondent State Water Resources Control Board. David A. Sandino appeared for the California Department of Water Resources, Real Party in Interest. Real Party in Interest United States Bureau of Reclamation did not appear.

The record of the administrative proceedings, along with the items of which judicial notice was taken, having been received into evidence and examined by the Court, no additional evidence having been received by the Court, arguments having been presented, and the Court having signed and filed, on May 5, 2003, a STATEMENT OF DECISION,

IT IS ORDERED, ADJUDGED AND DECREED that, for the reasons stated in the Court's STATEMENT OF DECISION, the petition for writ of mandate is DENIED, and the State Respondent shall recover costs.

Dated: June 19, 2003.

/s/ Roland L. Candee
ROLAND L. CANDEE
Judge of the Superior Court
Coordination Trial Judge

APPROVED AS TO FORM

Dated: June 16, 2003

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DANIEL J. O'HANLON

Attorneys for Petitioner/Plaintiff
Westlands Water District

APPENDIX F

[Logo]

REVISED

Water Right Decision 1641

In the Matter of:

Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary;

A Petition to Change Points of Diversion of the Central Valley Project and the State Water Project in the Southern Delta; and

A Petition to Change Places of Use and Purposes of Use of the Central Valley Project

Adopted December 29, 1999

Revised March 15, 2000
in Accordance with Order WR 2000-02

STATE WATER RESOURCES CONTROL BOARD
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

[Logo]

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Gray Davis, Governor

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

REVISED

DECISION 1641

In the Matter of Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; A Petition to Change Points of Diversion of the Central Valley Project and the State Water Project in the Southern Delta, and A Petition to Change Places of Use and Purposes of Use of the Central Valley Project.

Amending Permits and Licenses Listed in Table 1.

SOURCES: Sacramento and San Joaquin Rivers and their tributaries, and the Sacramento-San Joaquin Delta Estuary

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DECISION
IMPLEMENTING FLOW OBJECTIVES FOR THE BAY-DELTA ESTUARY, APPROVING A PETITION TO CHANGE POINTS OF DIVERSION OF THE CENTRAL VALLEY PROJECT AND THE STATE WATER PROJECT IN THE SOUTHERN DELTA, AND APPROVING A PETITION TO CHANGE PLACES OF USE AND PURPOSES OF USE OF THE CENTRAL VALLEY PROJECT

DECEMBER 29, 1999

REVISED IN ACCORDANCE WITH ORDER WR 2000-02
MARCH 15, 2000

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* * * *

2.0 BACKGROUND

2.1 Procedural History

The SWRCB has issued numerous orders and decisions regarding water quality and water right requirements for the Bay-Delta Estuary. The current water quality objectives are set forth in the 1995 Bay-Delta Plan, adopted May 22, 1995. The current water right requirements, applicable only to the water rights for the CVP and the SWP, are set forth in SWRCB Decision 1485 (D-1485) adopted in 1978, and in SWRCB Order WR 98-09 (Order WR 98-09), adopted on December 3, 1998.[3] The SWRCB adopted D-1485 to imple-

[3] The USBR has water right permits for much of the CVP appropriations pursuant to SWRCB Decision 990, adopted in February 1961. The USBR has permits to divert water from the Trinity River pursuant to SWRCB Permit Order 124. The USBR has permits to divert water from the Stanislaus River pursuant to SWRCB Decisions 1422 and 1616. The USBR has a permit to divert water in the Delta pursuant to SWRCB Decision 1020. The USBR has permits to divert water from the San Joaquin River pursuant to SWRCB Decision 935. The DWR has permits to divert water for the SWP appropriations from the Feather River and from the Delta pursuant to SWRCB Decision 1275, which was revised in SWRCB Decision 1291. D-1485 amended the SWP permits under Decision 1291 and the CVP permits under Permit Order 124 and under Decisions 990 and 1020.

ment the objectives in the 1978 Delta Plan.[4] Order WR 98-09 supersedes SWRCB Order WR 95-6 (Order WR 95-6) and temporarily extends the actions taken in Order WR 95-6, which the SWRCB adopted in response to a petition filed by DWR and the USBR to change some of the requirements in D-1485.[5] These orders have temporarily removed conflicts between D-1485 and the objectives in the 1995 Bay-Delta Plan, but Order WR 98-09 will expire on December 31, 1999.

This decision is part of the SWRCB's implementation of the 1995 Bay-Delta Plan. Many of the objectives in the 1995 Bay-Delta Plan are best implemented by making changes in the flow of water or in the operation of facilities that move water. Accordingly, this decision amends certain water rights by assigning responsibilities to the persons or entities holding those rights to help meet the objectives.

2.2 Physical Setting

The Bay-Delta Estuary includes the Sacramento-San Joaquin Delta, Suisun Marsh, and the embayments upstream of the Golden Gate. The Delta and Suisun Marsh are located where California's two major river systems, the Sacramento and San Joaquin rivers, converge to flow westward through San Francisco Bay. The watershed of the Bay-Delta Estuary is a source of water supplies for much of the state. The water is used for municipal, industrial, agricultural, and environmental purposes. The watershed is a source of drinking water for two-thirds of the state's population. The SWP, operated by the DWR, and the CVP, operated by the USBR, release

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[4] The full name of the 1978 Delta Plan is the Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh. It was adopted in August 1978, pursuant to SWRCB Resolution No. 78-43.

[5] Some objectives in the 1995 Bay-Delta Plan were not included in Order WR 95-6, but the DWR and the USBR have made commitments to meet most of those objectives in connection with Biological Opinions under the state and federal Endangered Species Acts.

previously-stored water into the Delta where they redivert the stored water and also divert natural flow. The water diverted by the two projects in the Delta is exported to areas south and west of the Delta through a system of water conveyance facilities.

The waterways of the Bay-Delta Estuary and its tributaries also are used by fish and wildlife and have other public trust values. Some of the fish that reside in the estuary or migrate through it are protected under the state or federal Endangered Species Act. Additionally, migratory birds and other animals use the marshlands of the estuary for food and habitat.

3.0 PURPOSE OF THIS PROCEEDING

The purpose of the proceeding in which this decision is made is to adopt water right decisions that will accomplish three goals. (1) Determine the interim and long-term responsibilities of water right holders listed in the Revised Notice of Public Hearing to help meet the objectives set forth in the 1995 Bay-Delta Plan. (2) Determine whether or not to approve, subject to terms and conditions, a joint petition of the DWR and the USBR to combine the points of diversion for the SWP and the CVP in the southern Delta. (3) Determine whether or not to approve, subject to terms and conditions, a petition of the USBR to change the places of use and purposes of use in its water right permits for operationally integrated parts of the CVP. These goals are the subjects of the Bay-Delta Water Rights Hearing. This decision partially accomplishes the first goal, and accomplishes the second and third goals. Future decisions in this proceeding will address completion of the first goal.

4.0 ISSUES CONSIDERED IN THE HEARING

The Revised Notice of Public Hearing, issued on May 6, 1998, lists several Key Hearing Issues. Each of these issues is followed in the notice by an explanation of the issue, putting it into context.

Two supplements to the Revised Notice of Public Hearing were issued, one for Phase 2A and one for Phase 2B. The supplemental notices included specific hearing issues for the two hearing phases, but the issues specifically did not supersede the Key Issues in the Revised Notice of Public Hearing.

4.1 Issues Noticed

The Key Issues for the hearing are:

a. Should the SWRCB extend the effective period of Order WR 95-6? If yes, how long should it be extended, and what terms and conditions should it contain?

b. What requirements for implementing the flow-dependent objectives in the 1995 Bay-Delta Plan should be adopted in a water right decision?

c. Should the SWRCB approve the petitioned changes of point of diversion under the CVP and SWP permits?

d. Should the SWRCB approve the petitioned changes of place of use and purpose of use of water under the CVP permits?

e. With respect to the negotiated agreements that have been reached among some of the parties, should the SWRCB add water right terms and conditions to the water rights of the parties to the agreements or take other actions to implement the regulatory provisions of these agreements?

f. What evidence supports the SWRCB's exercising its jurisdiction and taking action regarding the water rights listed in Enclosure 2, for the purpose of ensuring that water originating within the watersheds of the Bay-Delta Estuary is diverted and used within the constraints of California Constitution, Article X, section 2 (the reasonable use doctrine) and the public trust doctrine?

The hearing issues noticed for Phase 2A were:

a. What requirements for implementing the flow-dependent objectives in the 1995 Bay-Delta Plan should be adopted in a water right decision applicable to the San Joaquin River watershed?

b. With respect to the SJRA, should the SWRCB add water right terms and conditions to the water rights of the parties to the agreements or take other actions consistent with the SJRA? Should an SWRCB action consistent with the SJRA establish or eliminate responsibility on the part of water right holders listed in Enclosure 2a of the May 6, 1998 Revised Notice of Public Hearing, who are not signatories to the SJRA? Should any SWRCB action consistent with the SJRA require that the DWR and the USBR take full responsibility for meeting the Bay-Delta flow objectives that otherwise might be allocated to other water right holders within the San Joaquin River watershed?

c. What evidence supports the SWRCB's exercising its jurisdiction and taking action regarding the water rights listed in Enclosure 2, for the purpose of ensuring that water originating within the watersheds of the Bay-Delta Estuary

* * * *

1. The first stage is use of the JPOD to serve CVCC contractors, Musco Olive and the Veteran's Cemetery; and to make up export reductions taken to benefit fish. Until an operations plan is submitted and approved by the Executive Director of the SWRCB use of the JPOD shall be limited to the first stage except for exemptions noted below. Make up operations in the first stage shall not cause an increase in annual exports above that which would have been exported without use of the JPOD. The

SWRCB finds, based on the above discussion, that approval of the JPOD at this level with the response plan described in 11.6.3.1, will not injure any legal user of water and will not have a significant adverse effect on fish and wildlife.

2. The second stage is use of the JPOD for any authorized purpose under the permits, up to the limits specified in the current USCOE permit. Use of the JPOD at the second stage will be subject to the preparation and implementation of an operations plan acceptable to the Executive Director of the SWRCB that provides adequate protection to aquatic resources and other legal users of water. DWR will be the state lead agency for any required environmental documentation under CEQA for the operations plan.

3. The third stage is use of the JPOD for any authorized purpose under the permits, up to the physical capacity of the pumping plants. Use of the JPOD at the third stage will be subject to the operation of barriers or other mechanisms to protect water levels in the southern Delta, an operations plan acceptable to the Executive Director of the SWRCB that adequately protects aquatic resources and other legal users of water, and certification of a project-level EIR by the DWR for the ISDP or other barriers project.

The operations plans shall be prepared in consultation with the USFWS, NMFS, and DFG and shall include measures for the protection of aquatic resources and their habitat.

The Executive Director of the SWRCB will be authorized to grant short-term exemptions to the limits in stages 1 and 2 before the barriers are constructed, for the purpose of (1) conducting a recirculation study as discussed in Part 6 of this

decision, or (2) other purposes as the Executive Director of the SWRCB deems appropriate.

12.0 THE PETITION TO CHANGE AND CONSOLIDATE PLACES OF USE AND PURPOSES OF USE OF WATER UNDER CERTAIN PERMITS OF THE CVP

12.1 Background

On September 24, 1985, the USBR filed a petition requesting, among other things, that the place of use and purposes of use of water under its CVP water right permits be changed. This petition is referred to as the consolidated place of use (CPOU) petition. Originally, the USBR sought to (1) consolidate the authorized places of use of CVP water so that all permits and licenses for the

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change petition would (1) consolidate the places of use of many of the CVP water right permits, (2) expand the places of use to include areas where CVP water is being used outside an authorized place of use, and (3) conform all of the purposes of use under the CVP permits that are subject to the CPOU petition. Recognizing the programmatic nature of the discussion of the expansion lands in the CPOU EIR, the hearing notices did not include consideration of adding the expansion lands to the place of use. The expansion lands can be considered in future proceedings when any required environmental documentation has been prepared. The SWRCB expects that environmental documentation for the expansion lands will be prepared by the local public agencies seeking to expand the place of use into previously unserved areas.

12.2 SWRCB Authority Regarding Petitions for Change

The USBR filed the CPOU petition under Water Code sections 1700 through 1705. These sections govern changes

in appropriative water rights acquired under Division 2 of the Water Code. These sections require the permission of the SWRCB before a change can be made. Section 1702 provides that "[b]efore permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved." As discussed in Part 11 of this decision, section 1702 codifies the common law "no injury" rule prior to the Water Commission Act that an appropriator can make a change in its water right so long as the change is not injurious to other legal users of water. The issues regarding effects of the CPOU on other legal users of water are discussed below.

This action is subject to CEQA. Accordingly, the significant environmental effects of this action are considered and mitigation is required as appropriate. The SWRCB also has an affirmative duty to take the public trust into account and to protect the public trust where feasible (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446 [189 Cal.Rptr. 346].) The SWRCB must also consider the public interest. (Wat. Code § 1243.5.) The environmental effects of approving the petitioned changes considered in Phase 7 and the mitigation measures for the changes are discussed in Part 14 of this decision.

12.3 Current and Added Places of Use

A number of water users with lands outside the existing places of use depicted in the CPOU DEIR presented evidence to show that they had been using water in these areas for many years, often

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environmental effects of this change unless USBR demonstrates to the SWRCB that the encroachment is not subject to CEQA because it occurred before the effective date of CEQA, or that an exemption from mitigation requirements is

justified because the impacts of encroachment have already been mitigated. The figures attached to this decision depict the overall place of use of the sixteen CVP permits and the nineteen contractors' service areas where encroachment has occurred. The figures show the place of use with and without approval of the encroachment areas.

The San Luis -Water District argued that the SWRCB should not require mitigation of encroachment addressed in a prior CEQA document. This decision does not require mitigation where, based on CEQA or other applicable requirements, the impacts of encroachment have previously been mitigated. The existence of a prior CEQA document that addresses a project involving some of the encroachment lands, by itself, does not preclude this decision from requiring mitigation for that encroachment. This decision requires mitigation based on the SWRCB's authority to protect public interest and to protect public trust uses, and not solely on CEQA requirements. In addition, this decision involves a different project, because it applies to encroachment lands in all areas of the State receiving CVP water, than other projects that may have been addressed by prior CEQA documents but involve service within individual water districts. Even if the same project were involved for purposes of CEQA, the SWRCB could be held responsible for adopting appropriate mitigation requirements for any impacts identified as significant in the CPOU EIR, including impacts that were not treated as significant in a prior EIR certified by another agency. The current law establishing a conclusive presumption that an EIR is adequate for use by a responsible agency if no action is commenced during the allowable time period for challenging the lead agency's action did not take effect until 1978, and would not apply to earlier CEQA documents. (See Pub. Resources Code § 21167.2; Stats. 1977, c. 1200, p. 4004, § 18.)

12.4.3 Effects of Changing the Purposes of Use

Currently, the purposes of use among the USBR's sixteen permits subject to the CPOU petition are not uniform. Among the sixteen permits, the existing purposes of use are irrigation (12 permits), domestic (12 permits), municipal (7 permits), industrial (7 permits), fish and wildlife enhancement (2 permits), salinity control (3 permits), water quality control (4 permits), stock watering (3 permits), and recreation (8 permits). (SWRCB 2, Table 3-2, pp. [3-7]-[3-8].) Changing the purposes of use as petitioned would have the effect of making the permits consistent with the USBR's current operations, in which the USBR operates the CVP as an integrated project. It would allow the USBR to deliver water for irrigation, for example, under four permits to appropriate water from the American, Sacramento, and Trinity rivers, and from Rock Slough in the Delta. It would allow the USBR to deliver water for municipal use from these sources under nine of the sixteen permits subject to the change petition. It also would allow the USBR to maintain control over water it releases into a river for fish and wildlife enhancement, as in the case of the releases to be made for the VAMP experiment discussed in Part 6 of this decision.[68]

WWD objects to changing the purposes of use of the permits, arguing that this would cause injury to it and other CVP contractors. WWD argues that CVP contractors are legal users of water entitled to the protection of Water Code section 1702. As discussed below, however, a person or entity can use water legally without being a "legal user of water" within the meaning of Water Code section 1702. WWD further argues that if the changes in purposes of use are ap-

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[68] Specifically, the releases of CVP water to be made by the Exchange Contractors under the SJRA and for the purpose of the recirculation study required by this decision will require that CVP water be released into the San Joaquin River for the purpose of fish and wildlife enhancement.

proved the USBR will reduce the amount of water delivered to the contractors and will use the remaining water for other purposes. WWD argues that its water supply will be reduced because the USBR will use water that otherwise would be delivered to WWD for purposes of meeting requirements under the federal Endangered Species Act and under the 1992 Central Valley Project Improvement Act. In reply briefs, WWD was joined in its contentions by several of the other CVP contractors in the San Joaquin Valley. SDWA takes the position, without specifying any particular harm, that changing the purposes of use would allow the USBR meet new obligations under federal law instead of meeting existing obligations, and claims that this will occur at the expense of other parties. SDWA has not established that the change of purpose of use will injure any water rights it may have. Accordingly, this decision does not include further discussion of SDWA's position.

Before examining whether CVP contractors are legal users of water entitled to protection under Water Code section 1702, this decision examines whether the petitioned change in purposes of use would be the cause of the effects WWD asserts will occur. Whether or not the CVP contractors are entitled to protection under section 1702, the SWRCB has authority to apply public interest considerations to its decisions.

WWD's witness testified that WWD had received its full contractual allotment of 1,150,000[69] afa of CVP water in most years prior to enactment of the federal Central Valley Project Improvement Act (CVPIA) (Pub. L. 102-575, 106 Stat. 4600, § 3402) in 1992. Since 1990, WWD has received

[69] WWD's contractual allotment is in two parts: a 1963 contract for 900 taf and a judgment in *Barcellos and Wolfson, Inc. v. Westlands Water District*, Civ. No. F-79-106 EDP (E.D. CA) that provides WWD an additional 250 taf.

full deliveries only in 1996 and in 1999. (WWD 14, p. 5; 10, p. 2.) WWD presented evidence to show that since enactment of the CVPIA, it expects reductions in its CVP supply even in wet years, averaging 25 to 35 percent. (WWD 7, p. 2; 10, p. 5.) Federal Endangered Species Act requirements commencing in 1992 also caused reductions in the supply. (WWD 14, p. 6; 10, p. 2.) WWD blames the reductions in supply it has experienced since 1992 on USBR's use of water for fish and wildlife enhancement.

In response to WWD's assertions regarding the cause of reductions in CVP water supplies, USDI makes two points: (1) The SWRCB's approval of the petitioned change of purpose of use will not involve an actual change in the ongoing operation of the CVP, since it is impractical for the USBR to tie each purpose of use to a specific permit. (R.T. 12336.) (2) The CVP contractors, including WWD, are not entitled to a fixed supply of water in every year under their contracts. USDI pointed out that the contracts and the provisions of the *Barcellos* judgment expressly allow the USBR to reduce deliveries because of a shortage resulting from *any cause*. USDI interprets the contracts as allowing it to reduce water deliveries to its contractors when it is required to do so under federal laws.[70] The contractual requirements are a federal law matter between the USBR and the contractor. We note, however, that a federal court has addressed this issue with respect to the delivery of water to Area I of WWD, and has held that the USBR is not liable for damages arising from shortages in water deliveries resulting from any cause. (*O'Neill v. United States* (1995) 50 F.3d 677.)

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[70] The water right permits held by the USBR pursuant to the water right decisions cited by WWD all recognize that deliveries of water by the USBR to public agencies are subject to the contractual provisions between the USBR and the public agencies. (SWRCB Decisions 893, at term 16; 990 at term 29, and 1020 at term 13.)

USDI argues that the USBR is subject to Congressional directives under both the CVPIA and the federal Endangered Species Act (16 U.S.C. § 1531, et seq.). These laws, and actions that have been taken under these laws, require the USBR to deliver certain quantities of water to wildlife refuges and wildlife management areas and to forego certain water diversions. USDI argues that the SWRCB should approve the petitioned changes so that in satisfying its obligations under federal law, the USBR operates consistently with its water right permits. In effect, USDI is saying that it is required by federal law to operate in a way that causes shortages of water deliveries to its contractors, and that it will continue to do so whether or not the SWRCB approves the petitioned changes in purpose of use. If the USBR is bound by federal law to operate in this manner, the SWRCB's approval of the changes cannot be the cause of the shortages. Considering the potential for federal preemption of state requirements, the SWRCB herein examines the state laws and permit requirements as well as federal requirements.

WWD argues that the CVPIA does not preempt Water Code section 1702. (WWD ignores, however, any preemptive effect of the federal Endangered Species Act, which has played a major role in USBR's increased use of water for fish and wildlife purposes.) In the absence of a federal preemption, USBR is required, by section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383) to comply with the requirements of state law. (See *California v. United States* (1978) 438 U. S. 645, 674.) Section 3411 of the CVPIA provides:

> "Notwithstanding any other provision of this title, the Secretary shall, prior to the reallocation of water from any purpose of use or place of use specified within applicable Central Valley Project water rights permits and licenses to a purpose of use or place of use not specified within said permits or licenses, obtain a modification in those permits and licenses, in a manner consistent with the provisions of applicable state law, to

> allow such change in purpose of use or place of use." (CVPIA, Pub. L. 102-575, 106 Stat. 4600, § 3411(a).)

In effect, the USBR is seeking herein to satisfy this requirement.

Turning to the no-injury rule in section 1702, two questions arise. First, does the USBR require a change in purpose of use if it foregoes diversions or abandons water it has previously appropriated? If it does not require a change, then approving the change in purpose of use will not harm the CVP contractors. Second, are CVP contractors protected from changes in the amount of their contractual water supplies by Water Code section 1702?

Regarding the first question, in some circumstances the USBR would not need changes in its water right permits before it could release flows or change its operations to benefit fish and wildlife. A water right permit is an authorization to take and use water only to the extent and for the purpose allowed in the permit. (Wat. Code § 1381.) Water right permits establish limits on taking and using water through terms and conditions. Terms and conditions establish the maximum amount of water that can be taken and used, subject the permitted diversions to the rights of senior water right holders, specify where water can be diverted and used, specify the purposes for which it can be used, and establish other limits. A permit does not, however, require that a permittee take or use the water authorized under the permit.[71]

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[71] The remedies for not using a permit are that the SWRCB will either revoke the permit or find that the water right has reverted, making the water available for another water right applicant. (Wat. Code §§ 1241 and 1410 et seq.) A water right does not revert in less than five years, however, and the SWRCB's decision as to the existence of a reversion is discretionary. Likewise, the SWRCB's revocation of a permit is discretionary. In either case, the facts and circumstances would be considered in reaching a decision.

Thus, in the absence of a federal preemption of permit terms restricting the purpose of use, the USBR could, at least for a period of time, meet some of its federal obligations to protect fish and wildlife. For example, such obligations might include actions that involve releases of water into a river, where the USBR abandons the water and does not attempt to subsequently reclaim the water, or actions in which, through its operations, it foregoes diverting water that is available to it. The disadvantages of this approach are (1) the USBR could not object if a junior appropriator downstream of the point of abandonment took the water and used it, and (2) in the absence of a water right change that adds a purpose of use for fish and wildlife enhancement, the USBR could, over time, forfeit a portion of its water rights. (Wat. Code § 1241.)

Regarding the second question, WWD argues that it is the water right holder, and that the USBR is merely a trustee. Trustee language appears in only one of the water right decisions cited by WWD, SWRCB Decision 893 (D-893). In D-893, both permits for the Folsom Project are granted to the United States as "trustee for the benefit of the public agencies of the State together with the landowners and water users within such public agencies as shall be supplied with the water appropriated under the permits." These are the only permits cited by WWD in which the United States is designated as a trustee, and the language in these permits indicates that the trust responsibility extends not just to the recipients of water, but to all the public agencies of the state.[72] WWD relates the trustee designation to statements in *Ivanhoe Irr. Dist. v. All Parties and Persons* (1957) 47 Cal.2d

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[72] These permits include a term that restricts the place of use, until 1968, to Placer, Sacramento, and San Joaquin counties, to give these counties an opportunity to execute contracts with the USBR before other areas are served on a permanent basis. WWD is not located in these areas, so it is arguable that WWD would not be the intended primary beneficiary of any trust responsibility.

597, 625-626 [306 P.2d 824] rev'd 357 U.S. 275 [78 S.Ct. 1174]. (*Ivanhoe* involved a contract dispute in which the USBR had made a contract but had not yet obtained a water right.) In *Ivanhoe*, the California Supreme Court stated in dicta that the state of California is a trustee for the benefit of the people of the state, all of whom are water users. The court went on to say that if the United States administers the trust by developing, conserving, and distributing water, it steps into the shoes of the state as a trustee. D-893 was adopted in the year following the California *Ivanhoe* decision. Thus, the trustee status accorded to the USBR in D-893 apparently is meant to place the USBR in the shoes of the State of California, which has statutory and common law public trust responsibilities. These responsibilities are not the trust responsibilities of a fiduciary acting for the benefit of another, but are governmental responsibilities that include the ability to choose among actions to carry out the greater public benefit. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, cert. denied, 464 U.S. 977.) Accordingly, the trust language is of no help to WWD in claiming the USBR's water rights.

Title to the water rights under the permits is held by the USBR. The USBR obtained many but not all of the water right permits that are subject to the change petition pursuant to SWRCB Decisions 893, 990, and 1020. These decisions adopt numerous permit terms. WWD argues that terms common to these decisions provide that the right to use the water for irrigation shall be appurtenant to the land on which it is applied, and that because the right to use water for irrigation is appurtenant to the land where it is used, the contractors hold the water right. Except in the case of the two Folsom permits (Permits 11315 and 11316[73]), the permit terms cited by WWD accord this appurtenant aspect only to

[73] Permit 11316 does not include irrigation as a purpose of use.

irrigation use and not to municipal, stock watering, domestic, industrial, or other uses. In each case, the permit terms that address appurtenance provide, "shall be appurtenant to the land on which said water shall be applied, subject to continued beneficial use and the right to change the point of diversion, place of use and purpose of use, as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California, . . ."

An appurtenance is a right, privilege, or property that is incidental to the enjoyment of a more important right, such as land ownership. (American Heritage Dictionary, 2d College Ed.; Black's Law Dictionary, Rev'd 4th Ed.) In contrasting a riparian right with an appropriative right, the California Supreme Court has stated: "The right to the waters of a stream is real property, a part of the realty of the riparian lands originally, and a part of the realty as an appurtenance to any other lands to which it may be rightfully taken when the riparian rights have been divested in favor of the user on nonriparian land." (*Palmer v. Railroad Commission* (1914) 167 Calif. 163, 173 [138 P. 997, 1001].) It is apparent that the court believed that an appropriative right is not part and parcel of the land, while a riparian right is part and parcel of the land. Consistently, the law of appropriative rights does not require that an appropriator own the land on which water is used. (See, generally, Hutchins, The California Law of Water Rights (1956) pp. 70-71.) In particular, an appropriator can appropriate water that the appropriator does not use, but rather provides to another. (*Joerger v. Pacific Gas & Elec. Co.* (1929) 207 Cal. 8, 34, 276 Pac. 1017.) Thus, even if water use is appurtenant to the enjoyment of a particular property, that does not mean that the owner of that property is the water right holder.[74] Further, the permit language does not

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[74] In another context, the Court of Appeal recognized that the USBR is the water right holder. (*County of San Joaquin v. SWRCB* (1997) 54 Cal.App.4th 1144 [63 Cal.Rptr.2d 277].) The court observed: "appellants

dictate the quantity of water to be delivered to any end user. An appurtenance can remain appurtenant even if it is diminished. In effect making the water right appurtenant to land insofar as it is used for irrigation is a designation of a place of use of the water.

The phrase that follows the appurtenance language in each of the cited decisions is instructive. It provides that the right is "subject to continued beneficial use and the right to change the point of diversion, place of use, and purpose of use, as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California . . . ." Under the terms of Water Code section 1700 et seq., only water right holders are able to change their use of water. In this context, the permit term clearly contemplates that the USBR will be able to change its use of water under state law. This is a further affirmation that the USBR is the water right holder.

Finally, federal law does not support WWD's argument. Under *Israel v. Morton* (9th Cir. 1977) 549 F.2d 128, 132, there can be no vesting of state law water rights by beneficial users of federally-provided water. In *Israel*, the court drew a distinction between appropriation of water from the natural watercourse and the receipt of developed water from the United States. The court stated that the terms upon which the water can be put to use, and the manner in which rights to continued use can be acquired are for the United States to fix.

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assert the Bureau 'holds only legal title to the water' and 'has no substantial interest in the water,' emphasizing the Bureau 'uses no water.' The argument is highly misleading: the fact the Bureau does not consume water is not synonymous with having no substantial interest in the water. The Bureau has appropriative water rights in the Central Valley Project. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106, 227 Cal.Rptr. 161.) The Bureau owns the CVP facilities, has operational control and responsibilities relating to flood control, water supply, power generation, and fish and wildlife mitigation." (*Id.* at 1156 n. 12 [63 Cal.Rptr.2d at 285 n. 12].)

Finally, title to the water rights under the permits is held by the USBR, not by the contractors. (*Ivanhoe Irrigation Dist. v. McCracken* (1958) 357 U.S. 275, 290-291 [78 S.Ct. 1174, 1183]; *Ivanhoe Irrigation Dist. v. All Parties and Persons* (1960) 53 Cal.2d 692, 703-704, 715-716 [350 P.2d 69, 75, 82-83, 3 Cal.Rptr. 317, 323, 330-331].)

Taken to its logical end, WWD's argument that the end users of water are the water right holders would mean that instead of having a relatively few water purveyors subject to statewide regulatory authority of the SWRCB, there would be millions of water right holders. Instead of regulating the purveyors of water, the SWRCB would regulate the use of water at the end of pipes and canals in individuals' homes, businesses, and farms.

In view of the foregoing discussion, the SWRCB finds that section 1702 is not an appropriate basis for WWD to raise this issue, which essentially is a dispute between a contractor and its water supplier. This decision does not preclude water service contractors from protesting changes in existing water rights or applications for new water rights. Such contractors can file protests based on public interest grounds or on environmental and public trust grounds. Water service contractors may also file protests based on injury to the water right holder on whom they rely for deliveries under their water service contracts. Application of the "no injury" rule is not the proper basis for determining contractual or other claims between a water service contractor and the water right holder who supplies water under contract where those claims are not based on the proprietary water rights of the water service contractor. Where a water right holder proposes or agrees to a change, there can be no injury to that water right holder. Therefore, where a change is proposed by a water right holder, any protest based on the potential for reduced deliveries to water service contractors, whose contractual entitlements are dependent on the water rights of the water

right holder, must be based on other legal grounds. The petitioned change of purpose of use will allow the USBR to operate efficiently without violating its water right permits. Accordingly, the petitioned change of purpose of use is approved.

13.0 RESPONSIBILITIES OF DWR AND USBR

The primary subject of the Bay-Delta Water Rights Hearing is the assignment of responsibility for meeting the objectives in the 1995 Bay-Delta Plan. Another subject is whether and under what conditions to extend the changes in the water rights of the DWR and the USBR under Order WR 95-6 (extended by Order WR 98-09). Order WR 98-09 will expire on December 31, 1999. The responsibilities of the DWR and the USBR were addressed throughout the seven phases of hearing conducted so far. Other parts of this decision address a number of responsibilities of the USBR and the DWR for meeting objectives in the 1995 Bay-Delta Plan. Nevertheless, the operational objectives and some of the flow-dependent objectives that were changed in the 1991 water quality control plan or in the 1995 Bay-Delta Plan are not directly addressed in other parts of this decision. Orders WR 95-6 and WR 98-09 temporarily replaced the requirements in D-1485 for striped bass spawning, Suisun Marsh, and operational constraints (export rates and Delta Cross Channel Operations) with objectives from the 1995 Bay-Delta Plan. The additional flow-dependent objectives for fish and wildlife currently are being met by the DWR and the USBR pursuant to their obligations under the state and federal Endangered Species Acts. The questions addressed in this part of this decision are (1) which of the otherwise unallocated objectives should be implemented permanently by the DWR and the USBR, and (2) should the DWR and the USBR be required, in the interim until the responsibilities to meet the flow-dependent objectives are permanently allo-

cated, to implement all of the flow-dependent objectives that are not allocated to another party in this decision?

With the certification of a final EIR that addresses implementation of the changes the SWRCB made in these objectives when it adopted the 1995 Bay-Delta Plan, these revised objectives can now be made a permanent part of the water right permits of the DWR and the USBR. The objectives in the 1995 Bay-Delta Plan have been determined to ensure the reasonable protection of beneficial uses and the prevention of nuisance. (Wat. Code section 13241.) The flow-dependent objectives, including the objectives for operational constraints, in the 1995 Bay-Delta Plan are to be implemented through amendments to existing water rights.

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considerations of the greater public interest requires this action. Implementing the objectives is in the greater public interest. The environmental, economic, and social benefits of implementing the 1995 Bay-Delta Plan outweigh the potential adverse environmental effects that are not avoided or fully mitigated.

ORDER

IT IS HEREBY ORDERED that License 1986 (Application 23) and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 16600 and 20245 (Applications 13370, 13371, 234, 1465, 5638, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 19304, and 14858B, respectively) of the U.S. Bureau of Reclamation (USBR) and Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443, 14445A, 17512, and 17514A, respectively) of the California Department of Water Resources (DWR) shall be amended by

adding the following terms and conditions.* These Permits (CVP and SWP licenses and permits) are hereby ordered replaced with new updated and amended permits that will contain the terms and conditions specified herein and all current terms and conditions set forth in the original permits and subsequent decisions and orders.

1. Licensee/Permittee shall ensure that the water quality objectives for municipal and industrial beneficial uses and agricultural beneficial uses for the western Delta, interior Delta and export area as set forth in Tables 1 and 2, attached, are met on an interim basis, not later than November 30, 2001, until the Board adopts a further decision in the Ba -Delta Water Rights Hearing assigning responsibility for meeting these objectives.[77]

2. Licensee/Permittee shall ensure that the water quality objectives for Delta outflow and for Sacramento River flow at Rio Vista for fish and wildlife beneficial uses as set forth in Table 3, attached, are met on an interim basis, not later than November 30, 2001, until the Board adopts a further decision in the Bay-Delta Water Rights Hearing assigning responsibility for meeting these objectives.[78]

3. Licensee/Permittee shall implement the water quality compliance and baseline monitoring plan set forth in Table 5 on an interim basis, including construction, maintenance and operation of all necessary devices, until the Board adopts a further decision in the Bay-Delta Water

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* Table 1 on page 4 of this decision lists the projects associated with these water rights.

[77] This condition does not mandate that the Licensee/Permittee use water under this license/permit if it uses other sources of water or other means to meet this condition.

[78] This condition does not mandate that the Licensee/Permittee use water under this license/permit if it uses other sources of water or other means to meet this condition.

Rights Hearing assigning responsibility for meeting the requirements in Table 5.

4. Licensee/Permittee shall:

   a. In consultation with the U.S. Fish and Wildlife Service (USFWS), Department of Fish and Game (DFG), San Joaquin River Group Authority (SJRGA), City and County of San Francisco (CCSF), and CVP/SWP Export Interests, prepare a fishery monitoring plan for the Vernalis Adaptive Management Plan (VAMP) experiment consistent with the SJRA and with the findings in this decision. The plan shall specify study objectives, sampling locations, methodology, and sampling periods. The monitoring plan shall be submitted to the Executive Director of the SWRCB for approval within 60 days after the date of this order.

   b. Conduct the fishery monitoring studies according to the monitoring plan for the duration of the VAMP/SJRA study period, and submit results to the Executive Director of the SWRCB on an annual basis. A monitoring report summarizing the study methodology and results from each year's experiment shall be submitted to the Executive Director of the SWRCB by December 31 of each year. A final report shall be submitted to the Executive Director of the SWRCB no later than eight months following completion of the VAMP experiment.

5. The continuing authority condition shall be updated to read as follows:

   Pursuant to California Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the Board in accordance with law and in the interest

of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee/licensee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirement for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with

California Constitution Article X, Section 2; is consistent with the public interest; and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

6. The water quality objectives condition shall be updated to read as follows:

   The quantity of water diverted under this permit is subject to modification by the Board if, after notice to the permittee/licensee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

   (0000013)

7. Said permits/licenses are amended to include the following Endangered Species condition:

   This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee/licensee shall obtain authorization for an incidental take prior to

construction or operation of the project. Permittee/ Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit/license.

8. SWRCB Decision 1485 (D-1485) ordered that certain terms and conditions in this license/permit be added or amended. Except as amended or deleted herein, the terms and conditions set forth in D-1485 remain in this license/permit. The terms and conditions in D-1485 numbered 2, 3, 4, 5, and 8 are rescinded.

9. Condition 6 of D-1485 is amended to read:

   Upon request to and approval of the Executive Director of the SWRCB, variations in flow for experimental purposes for protection and enhancement of fish and wildlife may be allowed; provided that such variations in flow shall not cause violations of municipal, industrial and agricultural objectives in Tables 1 and 2.

10. Condition 7 of D-1485 is amended to read:

    For the protection of Suisun Marsh, Licensee/Permittee shall report to the Board by September 30 of each year on progress toward implementation of mitigation facilities and on water quality conditions in the Suisun Marsh during the previous salinity control season.

11. To ensure compliance with the water quality objectives, to identify meaningful changes in any significant water quality parameters potentially related to operation of the SWP or the CVP, and to reveal trends in ecological changes potentially related to project operations, Licensee/Permittee shall, independently or in cooperation with other agencies or individuals:

    a. Perform the Water Quality and Baseline Monitoring program described in Table 5 and in Figure 4 of this Order.

b. Conduct ongoing and future monitoring surveys as recommended by the DFG, the USFWS or the National Marine Fisheries Service (NMFS), and acceptable to the Executive Director of the SWRCB concerning food chain relationships, fisheries impacts, or impacts to brackish tidal marshes, as they are affected by operations of the SWP or the CVP in the Delta and Suisun Marsh.

c. Licensee/Permittee shall make available to the Board and others interested parties the results of the above monitoring as soon as practicable. Timely posting of this information on the Internet will satisfy this requirement. Licensee/Permittee shall submit to the Executive Director of the SWRCB, by December 1 of each year, annual reports summarizing the previous calendar year's findings and detailing future study plans.

d. If Licensee/Permittee anticipates violations of the water quality objectives or if such violations have occurred, Licensee/Permittee shall provide immediate written notification to the Executive Director of the SWRCB.

e. Licensee/Permittee shall evaluate the Water Quality Compliance and Baseline Monitoring once every three years to ensure that the goals of the monitoring program are attained. Licensee/Permittee shall report to the Executive Director of the SWRCB the conclusions based upon this evaluation. Licensee/ Permittee may propose appropriate modifications of the program for concurrence of the Executive Director of the SWRCB.

IT IS FURTHER ORDERED that Permits 11315, 11316, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12727, and 12860 (Applications 13370,

13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9368, and 15764, respectively) of the USBR (CVP except New Melones and Friant) shall be amended by adding the following terms and conditions:

1. In addition to all other points of diversion and rediversion authorized by this permit, Permittee may divert or redivert water up to 10,350 cfs at the Harvey O. Banks Pumping Plant (Banks Pumping Plant), located within the NW ¼ of the SE ¼ of Projected Section 20, T1 S, R3E, MDB&M and at Italian Slough, located within NW ¼ of the NE ¼ of Projected Section 24, T1 S, R3E, MDB&M, subject to the permission of the Department of Water Resources. This authorization has three stages corresponding to export rates and limitations on the purposes for which Permittee is authorized to divert or redivert water at the Banks Pumping Plant.

   a. All stages of this authorization are subject to the following terms and conditions:

      (1) Diversion by the USBR at Banks Pumping Plant is not authorized when the Delta is in excess conditions[79] and such diversion causes the location of X2[80] to shift upstream so far that:

         (a) It is east of Chipps Island (75 river kilometers upstream of the Golden Gate Bridge) during the months of February through May, or

         (b) It is east of Collinsville (81 kilometers upstream of the Golden Gate Bridge) during the months of January, June, July, and August, or

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[79] Excess conditions exist when upstream reservoir releases plus unregulated natural flow exceed Sacramento Valley inbasin uses, plus exports.

[80] For the purposes of this term, X2 is the most downstream location of either the maximum daily average or the 14-day running average of the 2.64 mmhos/cm isohaline.

(c) During December it is east of Collinsville and Delta smelt are present at Contra Costa Water District's point of diversion under Permits 20749 and 20750 (Application 20245).

(2) Any diversion by Permittee at the Banks Pumping Plant that causes the Delta to change from excess to balanced conditions[81] shall be junior in priority to Permits 20749 and 20750 of the Contra Costa Water District.

(3) Permittee may divert or redivert water at Banks Pumping Plant only if a response plan to ensure that water levels in the southern Delta will not be lowered to the injury of water users in the southern Delta has been approved by the Executive Director of the SWRCB. Permittee shall prepare the response plan with input from the designated representative of the South Delta Water Agency.

(4) All other provisions of the above permits are met.

(5) Permittee shall develop a response plan to ensure that the water quality in the southern and central Delta will not be significantly degraded through operations of the Joint Points of Diversion to the injury of water users in the southern and central Delta. Such a plan shall be prepared with input from the designated representative of the Contra Costa Water District and approved by the Chief, Division of Water Rights.

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[81] Balanced conditions exist when it is agreed by the SWP and the CVP that releases from upstream reservoirs plus unregulated flow approximately equal the water supply needed to meet Sacramento Valley inbasin uses, plus exports.

b. In Stage 1, Permittee is authorized to divert or redivert water at the Banks Pumping Plant to serve the Cross Valley Canal contractors and Musco Olive, and to support a recirculation study.[82]

Permittee also is authorized to divert or redivert water at the Banks Pumping Plant to recover export reductions taken to benefit fish, if exports by the Permittee at the Tracy Pumping Plant are reduced below the applicable export limits set forth in Table 3, attached.

(1) The authorization to divert or redivert water for the recovery of export reductions at the Banks Pumping Plant under Stage 1 is subject to the following provisions:

(a) Recovery of export reductions shall not cause an increase in annual exports above that which would have been exported without use of the Banks Pumping Plant.

(b) Recovery of export reductions using the Banks Pumping Plant shall occur within twelve months of the time the exports are reduced.

(c) Before Permittee diverts or rediverts water at Banks Pumping Plant, Permittee shall consult with DFG, USFWS, and NMFS. Consultation with the CALFED Operations Group established under the Framework Agreement will satisfy this requirement. Permittee shall submit agreements on coordinated operations under this authorization to the Executive Director of the SWRCB for approval and shall also submit complete documentation showing that no additional water will be exported because of the use of the Banks Pumping Plant, including

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[82] The recirculation study is described in Term 2 below.

the method used to make this determination. Authority is delegated to the Executive Director of the SWRCB to act on the proposal if the conditions set forth above are met.

(2) The Executive Director of the SWRCB is authorized to grant short-term exemptions to the export limits in Stage 1, for the purpose of (a) conducting the recirculation study discussed below, or (b) other purposes as the Executive Director of the SWRCB deems appropriate, provided that such exemptions will not have a significant adverse effect on the environment and will not cause injury to other legal users of water.

c. In Stage 2, Permittee will be authorized to divert or redivert water at the Banks Pumping Plant for any purpose authorized under the above permits, subject to the following.

(1) Permittee shall develop in consultation with the DWR, the DFG, the USFWS and the NMFS an operations plan to protect fish and wildlife and other legal users of water. The operations plan shall be submitted to the Executive Director of the SWRCB for approval at least 30 days prior to use by the USBR of Banks Pumping Plant. The plan shall include, but not be limited to, the following elements:

(a) The plan shall include specific measures to avoid or minimize the effects of the export operations at Banks Pumping Plant on entrainment and through-Delta survival of chinook salmon. The plan shall include monitoring of environmental conditions and fish abundance at upstream locations, as appropriate, to determine vulnerability of chinook salmon to

entrainment at Banks Pumping Plant. The plan shall include monitoring of entrainment at Banks Pumping Plant. The plan shall include the frequency and method of data collection.

(b) The plan shall include minimum survival levels for chinook salmon. The minimum survival levels shall be used to trigger consultation with fishery agencies regarding data evaluation and decision making to minimize or avoid the impact of pumping at Banks Pumping Plant. The plan shall identify the consultation process that will be used including identifying the parties who will consult, how they will be notified, and a time schedule for decision making.

(c) The plan shall include specific measures at Trinity, Shasta, or Folsom Reservoirs when Permittee is using Banks Pumping Plant, to avoid or minimize adverse effects to chinook salmon if upstream or Delta monitoring indicates that such impacts are occurring. Measures may include the reoperation of the Delta Cross Channel Gates, increasing Delta outflow, or reducing exports at Banks Pumping Plant.

(d) The plan shall include operating criteria to ensure that use of the JPOD does not significantly impact aquatic resources in upstream areas due to changes in flow, water temperature, and reservoir water levels.

(e) The plan shall include specific measures to protect other legal users of water.

(f) The plan shall include specific measures to mitigate significant effects on recreational and cultural resources at affected reservoirs.

(2) Diversions or rediversions of water by the Permittee at Banks Pumping Plant shall not result in daily diversions into Clifton Court Forebay in excess of 13,870 acre-feet or three-day average diversion of 13,250 acre-feet/day, except during the period from mid-December to mid-March when San Joaquin River flow at Vernalis exceeds 1000 cubic feet per second (cfs), during which time diversions into Clifton Court Forebay may be increased by one-third of the San Joaquin River flow at Vernalis.

(3) The Executive Director of the SWRCB is authorized to grant short-term exemptions to the export limits in Stage 2, for the purpose of (a) conducting the recirculation study discussed below, or (b) other purposes as the Executive Director of the SWRCB deems appropriate, provided that such exemptions will not have a significant adverse effect on the environment and will not cause injury to other legal users of water.

d. In Stage 3, Permittee will be authorized to divert or redivert water at the Banks Pumping Plant for any authorized purpose under the above permits, up to the physical capacity of the Banks Pumping Plant, subject to completion of the following measures.

(1) Permittee shall prepare an operations plan acceptable to the Executive Director of the SWRCB, that will protect aquatic resources and their habitat and will protect other legal users of water. The operations plan shall include the same elements required for Stage 2. Permittee shall prepare the operations plan in consultation with the DWR, USFWS, NMFS, and DFG.

(2) Permittee shall protect water levels in the southern Delta through measures to maintain water levels at elevations adequate for diversion of water for agricultural uses. This requirement can be satisfied through construction and operation of three permanent tidal barriers in the southern Delta or through other measures that protect water quality in the southern and central Delta and protect water levels at elevations adequate to maintain agricultural diversions. If construction and operation of tidal barriers is used as a basis for Stage 3 operation, such construction and operation shall be subject to certification of a project-level Environmental Impact Report by the DWR that discloses the impacts of the tidal barriers.

2. Permittee shall prepare a Plan of Action (POA) for a recirculation analysis alternative to evaluate the feasibility and impacts of recirculating water from the Delta Mendota Canal through the Newman Wasteway. The POA shall be submitted for approval by the Executive Director of the SWRCB by October 1, 2000. The purpose of the POA will be to develop a thorough workplan for determining the feasibility of use of recirculation as a method for meeting and/or augmenting the Vernalis objectives and San Joaquin water quality objectives.

   The POA shall include tasks for the evaluation of:

   a. Potential impacts of changes in water composition on Delta native fish and on imprinting of juvenile fall-run chinook salmon and steelhead in the San Joaquin basin;

   b. Potential effects of increased exports on in-Delta hydrodynamics and fish entrainment at the SWP and CVP export facilities;

c. Potential effects of salt and contaminant loading in the San Joaquin basin due to recirculation of water through the Newman Wasteway;

d. Impacts on water deliveries to exchange contractors and other contractors receiving water from the Delta Mendota Canal, the State Aqueduct, and San Luis Reservoir;

e. The capacity of the physical facilities to implement recirculation. A description of any needed structural/ channel modifications, a cost estimate, and a determination of potential conserved water over other alternatives to meet Delta flow and VAMP requirements shall be provided; and

f. Potential for improvements in water quality in the San Joaquin River as a result of recirculation.

Permittee shall develop the POA in consultation with the DWR, SDWA, NMFS, USFWS, and DFG. It shall include a schedule for milestones and due dates for implementation, and identify a funding source(s) for the study. The POA study shall be completed within two years of approval of the POA. Permittee shall submit semi-annual reports to the Executive Director of the SWRCB on study progress and results. A final report summarizing analyses, results, and conclusions shall be submitted to the Executive Director of the SWRCB within six months after the recirculation analysis is completed.

3. Licensee/Permittee shall ensure that the San Joaquin River salinity; eastern Suisun Marsh salinity; western Suisun Marsh salinity at Chadbourne Slough, at Sunrise Duck Club (station S-21), and Suisun Slough near Volanti Slough (station S-42); export limits; and Delta Cross Channel Gates closure objectives for fish and wildlife beneficial uses as set forth in Table 3, attached, are met.

If any Suisun Marsh salinity objectives at the above locations are exceeded at a time when the Suisun Marsh Salinity Control Gates are being operated to the maximum extent, then such exceedances shall not be considered violations of this permit/license. A detailed operations report acceptable to the Executive Director of the SWRCB regarding Suisun Marsh Salinity Control Gate operation and a certification from the parties that the gates were operated to the extent possible must be submitted to receive the benefit of this exception.

4. Permittee is jointly responsible with the DWR for providing Delta flows that otherwise might be allocated to Mokelumne River water right holders.

IT IS FURTHER ORDERED that Permits 16478, 16479, 16481, and 16482 (Applications 5630, 14443, 14445A, and 17512, respectively)* of the DWR (SWP permits) are amended by adding the following terms and conditions:

1. In addition to all other points of diversion and rediversion authorized by this permit, Clifton Court Forebay, located within the NW ¼ of the SE ¼ of Projected Section 20, T1 S, R4E, MDB&M is added as a point of diversion and point of rediversion.
2. In addition to all other points of diversion and rediversion authorized by this permit, Permittee may divert or redivert water up to 4,600 cfs at the Tracy Pumping Plant, located within the SW ¼ of the SW ¼ of Projected Section 31, T1 S, R4E, MDB&M subject to the permission of the USBR. This authorization has three stages corresponding to export rates and limitations on the purposes for which Permittee is authorized to divert or redivert water at the Tracy Pumping Plant.
    a. All stages of this authorization are subject to the following terms and conditions:
        (1) Diversion by the DWR at Tracy Pumping Plant is not authorized when the Delta is in excess con-

ditions[83] and such diversion causes the location of X2[84] to shift upstream so far that:

(a) It is east of Chipps Island (75 river kilometers upstream of the Golden Gate Bridge) during the months of February through May, or

(b) It is east of Collinsville (81 river kilometers upstream of the Golden Gate Bridge) during the months of January, June, July, and August, or

(c) During December it is east of Collinsville and Delta smelt are present at CCWD's point of diversion under Permits 20749 and 20750 (Application 20245).

(2) Any diversion by Permittee at the Tracy Pumping Plant that causes the Delta to change from excess to balanced conditions[85] shall be junior in priority to Permits 20749 and 20750 of the Contra Costa Water District.

(3) Permittee may divert or redivert water at Tracy Pumping Plant only if a response plan to ensure that water levels in the southern Delta will not be lowered to the injury of water users in the southern Delta has been approved by the Executive Director of the SWRCB. Permittee shall prepare

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[83] Excess conditions exist when upstream reservoir releases plus unregulated natural flow exceed Sacramento Valley inbasin uses, plus exports.

[84] For the purposes of this term, X2 is the most downstream location of either the maximum daily average or the 14-day running average of the 2.64 mmhos/cm isohaline.

[85] Balanced conditions exist when it is agreed by the SWP and the CVP that releases from upstream reservoirs plus unregulated flow approximately equal the water supply needed to meet Sacramento Valley inbasin uses, plus exports.

the response plan with input from the designated representative of the SDWA.

(4) All other provisions of the above permits are met.

(5) Permittee shall develop a response plan to ensure that the water quality in the southern and central Delta will not be significantly degraded through operations of the Joint Points of Diversion to the injury of water users in the southern and central Delta. Such a plan shall be prepared with input from the designated representative of the Contra Costa Water District and approved by the Chief, Division of Water Rights.

b. In Stage 1, Permittee is authorized to divert or redivert water at the Tracy Pumping Plant to recover export reductions taken to benefit fish, if exports by the Permittee at the Banks Pumping Plant are reduced below the applicable export limits set forth in Table 3, attached.

(1) The authorization to divert or redivert water at the Tracy Pumping Plant under Stage 1 is subject to the following provisions:

(a) Recovery of export reductions shall not cause an increase in annual exports above that which would have been exported without use of the Tracy Pumping Plant.

(b) Recovery of export reductions using the Tracy Pumping Plant shall occur within twelve months of the time the exports are reduced.

(c) Before Permittee diverts or rediverts water at Tracy Pumping Plant, Permittee shall consult with DFG, USFWS, and NMFS. Consultation with the CALFED Operations Group established under the Framework Agreement will satisfy this requirement. Permittee shall submit

agreements on coordinated operations under this authorization to the Executive Director of the SWRCB for approval and shall also submit complete documentation showing that no additional water will be exported because of the use of the Tracy Pumping Plant, including the method used to make this determination. Authority is delegated to the Executive Director of the SWRCB to act on the proposal if the conditions set forth above are met.

(2) The Executive Director of the SWRCB is authorized to grant short-term exemptions to the export limits in Stage 1, for purposes as the Executive Director of the SWRCB deems appropriate, provided that such exemptions will not have a significant adverse effect on the environment and will not cause injury to other legal users of water.

c. In Stage 2, Permittee will be authorized to divert or redivert water at the Tracy Pumping Plant for any purpose authorized under the above permits, subject to the following.

(1) Permittee shall develop in consultation with the USBR, the DFG, the USFWS and the NMFS an operations plan to protect fish and wildlife and other legal users of water. The operations plan shall be submitted to the Executive Director of the SWRCB for approval at least 30 days prior to use by the DWR of Tracy Pumping Plant. The plan shall include, but not be limited to, the following elements:

(a) The plan shall include specific measures to avoid or minimize the effects of the export operations at Tracy Pumping Plant on entrainment and through-Delta survival of chinook salmon. The plan shall include monitoring of

environmental conditions and fish abundance at upstream locations, as appropriate, to determine vulnerability of chinook salmon to entrainment at Tracy Pumping Plant. The plan shall include monitoring of entrainment at Tracy Pumping Plant. The plan shall include the frequency and method of data collection.

(b) The plan shall include minimum survival levels of protection for chinook salmon. The minimum survival levels shall be used to trigger consultation with fishery agencies regarding data evaluation and decision making to minimize or avoid the impact of pumping at Tracy Pumping Plant. The plan shall identify the consultation process that will be used including identifying the parties who will consult, how they will be notified, and a time schedule for decision making.

(c) The plan shall include specific measures at Oroville Reservoir, to avoid or minimize any adverse effects to chinook salmon when Permittee is using Tracy Pumping Plant, if upstream or Delta monitoring indicates that such impacts are occurring. Measures may include the reoperation of the Delta Cross Channel Gates, increasing Delta outflow, or reducing exports at Tracy Pumping Plant.

(d) The plan shall include operating criteria to ensure that use of the JPOD does not significantly impact aquatic resources in upstream areas due to changes in flow, water temperature, and reservoir water levels.

(e) The plan shall include specific measures to protect other legal users of water.

(f) The Plan shall include specific measures to mitigate significant effects on recreation and cultural resources at affected reservoirs.

(2) The Executive Director of the SWRCB is authorized to grant short-term exemptions to the export limits in Stage 2, for purposes as the Executive Director of the SWRCB deems appropriate, provided that such exemptions will not have a significant adverse effect on the environment and will not cause injury to other legal users of water.

d. In Stage 3, Permittee will be authorized to divert or redivert water at the Tracy Pumping Plant for any authorized purpose under the above permits, up to the physical capacity of the Tracy Pumping Plant, subject to completion of the following measures.

(1) Permittee shall prepare an operations plan acceptable to the Executive Director of the SWRCB that will protect aquatic resources and their habitat and will protect other legal users of water. The operations plan shall include the same elements required for Stage 2. Permittee shall prepare the operations plan in consultation with the USBR, USFWS, NMFS, and DFG.

(2) Permittee shall protect water levels in the southern Delta through measures to maintain water levels at elevations adequate for diversion of water for agricultural uses. This requirement can be satisfied through construction and operation of three permanent tidal barriers in the southern Delta or through other measures that protect water quality in the southern and central Delta and protect water levels at elevations adequate to maintain agricultural diversions. If construction and operation of tidal barriers is used as a basis for Stage 3 operation, such construction and operation shall be

subject to certification of a project-level Environmental Impact Report by Permittee that discloses the impacts of the tidal barriers.

3. Licensee/Permittee shall ensure that the San Joaquin River salinity; eastern Suisun Marsh salinity; western Suisun Marsh salinity at Chadbourne Slough, at Sunrise Duck Club (station S-21), and Suisun Slough near Volanti Slough (station S-42); and export limits for fish and wildlife beneficial uses as set forth in Table 3, attached, are met.

   If any Suisun Marsh salinity objectives at the above locations are exceeded at a time when the Suisun Marsh Salinity Control Gates are being operated to the maximum extent, then such exceedances shall not be considered violations of this permit/license. A detailed operations report acceptable to the Executive Director of the SWRCB regarding Suisun Marsh Salinity Control Gate operation and a certification from the parties that the gates were operated to the extent possible must be submitted to receive the benefit of this exception.

4. Permittee is jointly responsible with the USBR for providing Delta flows that otherwise might be allocated to Mokelumne River water right holders.

5. Permittee shall provide water to meet any responsibility of water right holders within the North Delta Water Agency to provide flows to help meet the 1995 Bay-Delta Water Quality Control Plan objectives as long as the 1981 contract between North Delta Water Agency and the DWR is in effect.

6. This permit is conditioned upon implementation of the water quality objectives for agricultural beneficial uses in the southern Delta, as specified in Table 2, attached, at the following locations in the southern Delta:

   a. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);

b. Old River near Middle River (Interagency Station No. C-8; and

c. Old River at Tracy Road Bridge (Interagency Station No. P-12).

Permittee has latitude in its method for implementing the water quality objectives at Stations C-6, C-8, and P-12, above; however, a barrier program in the southern Delta may help to ensure that the objectives are met at these locations. If Permittee exceeds the objectives at stations C-6, C-8, or P-12, Permittee shall prepare a report for the Executive Director. The Executive Director will evaluate the report and make a recommendation to the SWRCB as to whether enforcement action is appropriate or the noncompliance is the result of actions beyond the control of the Permittee.

IT IS FURTHER ORDERED that Permit 12860 (Application 15764)* of the USBR shall be amended by deleting Permit Term 2, which corresponds to Term 2 in SWRCB Decision 1020.

IT IS FURTHER ORDERED that License 1986 (Application 23) and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, and 15735 (Applications 13370, 13371, 234, 1465, 5638, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, and 22316, respectively) of the USBR (CVP except New Melones) are amended by adding the following permit condition:

1. This permit is conditioned upon implementation[86] of the water quality objectives for agricultural beneficial uses in

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[86] This condition does not mandate that the Licensee/Permittee use water under this license/permit to meet this condition if it uses other sources of water or other means to meet this condition.

the southern Delta, as specified in Table 2, attached, at the following locations in the southern Delta:

a. San Joaquin River at Airport Way Bridge, Vernalis (Interagency Station No. C-10);

b. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);

c. Old River near Middle River (Interagency Station No. C-8); and

d. Old River at Tracy Road Bridge (Interagency Station No. P-12).

Licensee/Permittee has latitude in its method for implementing the water quality objectives at Stations C-6, C-8, and P-12, above; however, a barrier program in the southern Delta may help to ensure that the objectives are met at these locations. If Licensee/Permittee exceeds the objectives at stations C-6, C-8, or P-12, Licensee/Permittee shall prepare a report for the Executive Director. The Executive Director will evaluate the report and make a recommendation to the SWRCB as to whether enforcement action is appropriate or the noncompliance is the result of actions beyond the control of the Licensee/Permittee.

Licensee/Permittee shall, at all times, meet the Vernalis water quality objectives for agricultural beneficial uses at Vernalis. Licensee/Permittee may meet these objectives through flows or other measures. Licensee/Permittee shall develop a program under which it will meet these objectives consistently. Licensee/Permittee shall conduct modeling and planning studies to evaluate the effectiveness of its program to meet the Vernalis water quality objectives. If, within five years, Licensee/Permittee has not developed a program under which it will consistently

achieve the Vernalis objectives, Licensee/Permittee shall report to the Executive Director of the SWRCB all actions it has taken in attempting to meet the objectives, including drainage and management alternatives. The Executive Director of the SWRCB will evaluate the report and will decide whether further action should be taken by the SWRCB to ensure that the objectives are met.

Licensee/Permittee also shall report any expected noncompliance as soon as possible. The report of actions taken shall be submitted within three months following the period in which the requirements are not met.

IT IS FURTHER ORDERED that Permits 16597 and 16600 (Applications 14858A and 19304, respectively) * of the USBR (New Melones storage) are amended as follows:[87]

1. Term 19[88] of these permits is replaced with the following term:

   In conjunction with other measures to control salinity, Permittee shall release water from New Melones Reservoir to maintain the Vernalis agricultural salinity objective specified in Table 2, attached.

   Permittee shall release water from New Melones Reservoir for water quality purposes so as to maintain a dissolved oxygen concentration in the Stanislaus River as specified in the Water Quality Control Plan for the Sacramento and San Joaquin river basins.

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[87] Conditions 1, 2, and 3 below do not mandate that the Permittee use water under these permits to meet these conditions if it uses other sources of water or other means to meet these conditions.

[88] Term 19 in these permits corresponds to Condition 5 of Water Right Decision 1422.

Licensee/Permittee shall, at all times, meet the Vernalis water quality objectives for agricultural beneficial uses at Vernalis. Licensee/Permittee may meet these objectives through flows or other measures. Licensee/Permittee shall develop a program under which it will meet these objectives consistently. Licensee/Permittee shall conduct modeling and planning studies to evaluate the effectiveness of its program to meet the Vernalis water quality objectives. If, within five years, Licensee/Permittee has not developed a program under which it will consistently achieve the Vernalis objectives, Licensee/Permittee shall report to the Executive Director of the SWRCB all actions it has taken in attempting to meet the objectives, including drainage and management alternatives. The Executive Director of the SWRCB will evaluate the report and will decide whether further action should be taken by the SWRCB to ensure that the objectives are met.

Permittee also shall report any expected noncompliance as soon as possible. The report of actions taken shall be submitted within three months following the period in which the requirements are not met.

In addition, Permittee shall ensure that the water quality objectives for agricultural beneficial uses in the southern Delta, as specified in Table 2, attached, are met at the following locations:

a. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);

b. Old River near Middle River (Interagency Station No. C-8); and

c. Old River at Tracy Road Bridge (Interagency Station No. P-12).

Permittee has latitude in its method for implementing the water quality objectives at Stations C-6, C-8, and P-12, above; however, a barrier program in the southern Delta may help to ensure that the objectives are met at these

locations. If Permittee exceeds the objectives at stations C-6, C-8, or P-12, Permittee shall prepare a report for the Executive Director. The Executive Director will evaluate the report and make a recommendation to the SWRCB as to whether enforcement action is appropriate or the noncompliance is the result of actions beyond the control of the Permittee.

2. Permittee shall, on an interim basis until the Board adopts a decision assigning permanent responsibility for meeting the water quality objectives:

   a. Ensure that the water quality objective for fish and wildlife beneficial uses for San Joaquin River flow at Airport Way Bridge, Vernalis set forth in Table 3 is met, with the exception that during the April-May pulse flow period while the SJRA is in effect, experimental target flows set forth in (b) below may be provided in lieu of meeting this objective.

   b. During the April-May pulse flow period while the SJRA is in effect, maintain San Joaquin River flows at Airport Way Bridge, Vernalis, as follows, in lieu of meeting said river flow objective:

Existing Flow (cfs)	**Target Flow (cfs)**
0-1,999	2,000
2,000-3,199	3,200
3,200-4,449	4,450
4,450-5,699	5,700
5,700-6,999	7,000
7,000 or greater	Existing Flow

During years when the sum of the current year's 60-20-20 indicator and the previous year's 60-20-20 indicator is seven (7) or greater, target flows shall be one step higher than those required by the above table. The Permittee is not required to meet the target flow during years when the sum of the current

year's 60-20-20 indicator and the previous two years' 60-20-20 indicator is four (4) or less, using the following table.

SJR Basin 60-20-20 Classification	60-20-20 Indicator
Wet	5
Above normal	4
Below normal	3
Dry	2
Critical	1

3. If the San Joaquin River Agreement (SJRA) is dissolved by the signatory parties before it expires, then Permittee shall meet the San Joaquin River flow objective set forth in Table 3 until the Board establishes alternative implementation of the San Joaquin River flow objective.

IT IS FURTHER ORDERED that Permit 20245 (Application 14858B)* of the USBR (New Melones direct diversion) is amended by replacing Condition 21[89] of that permit as follows:

1. For the protection of water quality, no diversion is authorized for consumptive uses under this permit unless the San Joaquin River at Airport Way Bridge, Vernalis, salinity objective for agricultural beneficial uses, as specified in Table 2, attached, is met and the dissolved oxygen objectives in the Stanislaus River are met as specified in the Water Quality Control Plan for the Sacramento and San Joaquin River basins.

   Licensee/Permittee shall, at all times, meet the Vernalis water quality objectives for agricultural beneficial uses at Vernalis. Licensee/Permittee may meet these objectives through flows or other measures. Licensee/Permittee shall develop a program under which it will meet these objec-

[89] Term 21 in this permit corresponds to Condition 12 of Water Right Decision 1616.

tives consistently. Licensee/Permittee shall conduct modeling and planning studies to evaluate the effectiveness of its program to meet the Vernalis water quality objectives. If, within five years, Licensee/Permittee has not developed a program under which it will consistently achieve the Vernalis objectives, Licensee/Permittee shall report to the Executive Director of the SWRCB all actions it has taken in attempting to meet the objectives, including drainage and management alternatives. The Executive Director of the SWRCB will evaluate the report and will decide whether further action should be taken by the SWRCB to ensure that the objectives are met.

Permittee also shall report any expected noncompliance as soon as possible. The report of actions taken shall be submitted within three months following the period in which the requirements are not met.

In addition, Permittee shall ensure that the water quality objectives for agricultural beneficial uses in the southern Delta, as specified in Table 2, attached, are met at the following locations:

a. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);

b. Old River near Middle River (Interagency Station No. C-8); and

c. Old River at Tracy Road Bridge (Interagency Station No. P-12).

Permittee has latitude in its method for implementing the water quality objectives at Stations C-6, C-8, and P-12, above; however, a barrier program in the southern Delta may help to ensure that the objectives are met at these locations. If Permittee exceeds the objectives at stations C-6, C-8, or P-12, Permittee shall prepare a report for the Executive Director. The Executive Director will evaluate the report and make a recommendation to the SWRCB as

to whether enforcement action is appropriate or the noncompliance is the result of actions beyond the control of the Permittee.

IT IS FURTHER ORDERED that Permits 12721, 11967, 12722, 12723, 12725, 12726, 12727, 11315, 11316, 11968, 11969, 12860, 11971, 11973, 12364, 15735, (Applications 5626, 5628, 9363, 9364, 9366, 9367, 9368, 13370, 13371, 15374, 15375, 15764, 16767, 17374, 17376, and 22316, respectively) of the USBR involved in the petitioned changes of place and purposes of use shall be amended as follows:

1. The purpose of use is identified as: Irrigation, Domestic, Municipal, Industrial, Fish and Wildlife Enhancement, Salinity Control, Water Quality Control, Stockwatering and Recreation.

2. The place of use is situated within portions of the following counties, as shown on USBR Map No. 214-208-12581 on file with the Board, and as further delineated in the GIS maps on file with the Board and attached to this Order.

Alameda	Madera	Santa Clara
Butte	Merced	Shasta
Colusa	Napa	Solano
Contra Costa	Placer	Stanislaus
El Dorado	Sacramento	Sutter
Fresno	San Benito	Tehama
Glenn	San Francisco	Trinity
Kern	San Joaquin	Tulare
Kings	San Mateo	Yolo

3. Except as provided below, Permittee shall provide compensation and habitat values equivalent to those that were associated with the lands (encroachment lands) that were receiving CVP water prior to being added to a CVP place of use on December 29, 1999, provided that such lands were converted from native habitat as a result of appli-

cation of CVP water. The maximum total habitat compensation required by this term is the equivalent of the 45,390 acres of habitat identified in the final EIR for the Consolidated and Conformed Place of Use as having been converted from native habitat as a result of the delivery of CVP water. The habitat compensation shall consist substantially of the following mix of habitats:

- 3 acres of valley-foothill hardwood-conifer
- 1 acre of mixed chaparral
- 4,278 acres of valley-foothill riparian/fresh emergent wetland
- 17,944 acres of annual grassland
- 23,165 acres of alkali scrub

In any event, the acreage set aside for habitat compensation pursuant to this condition shall not exceed 45,390 acres, less any reductions approved by the Executive Director in accordance with the following guidelines. If approved by the Executive Director of the SWRCB, the maximum amount of habitat compensation and acreage set forth above may be reduced at the rate of one acre for one acre if the Permittee demonstrates that one or more of the following circumstances exist with respect to a specified encroached area within the 45,390 acres: (1) the encroachment is not subject to CEQA because it occurred prior to the effective date of CEQA; (2) the encroachment has been previously mitigated through measures equivalent to the habitat compensation that would satisfy this permit term; and (3) the encroachment occurred after the land involved was converted to agriculture from native habitat.

For the purpose of providing habitat values that compensate for those associated with the converted lands subject to this term, Permittee shall identify, define and delineate existing habitats of special status plant and animal species within the habitat types listed above in

consultation with DFG and the USFWS. Upon delineation of these habitats, Permittee shall develop, in consultation with DFG and the USFWS, an upland species Habitat Management Plan (HMP) with specific mitigation measures, funding methods and schedules. Suitable mitigation for the impacts to the habitat converted, up to mitigation for 45,390 acres of habitat, could consist of several different programs to acquire, maintain, and restore the habitat values needed to support the listed species that were previously found on these lands. Measures to obtain these habitat values could include, but are not limited to:

a. Acquiring lands for habitat restoration for the listed species.

b. Implementing management programs to enhance existing habitat values for the listed species.

c. Acquiring development rights or easements to control land use activities to be consistent with target species needs and habitat requirements.

The HMP proposed by the Permittee shall be submitted to the Executive Director of the SWRCB for review and approval within 18 months from the date of this order. If the Permittee elects to provide compensation through habitat acquisition, the acreage acquired shall be deemed to provide, for each habitat type acquired, equivalent habitat values to those lost through conversion of an equal acreage of that habitat type to irrigated agriculture, except where the Permittee demonstrates that a lesser acreage of replacement habitat will provide habitat of equivalent value to the acreage that has been converted. The funding of habitat and species mitigation measures identified in the HMP shall focus on and be consistent with existing or future Habitat Conservation Plans for special status terrestrial species and their habitats.

Changes in the HMP may be made through a process of adaptive management after consultation with the DFG and the USFWS and approval by the Executive Director of the SWRCB.

Permittee shall be responsible for compliance with federal and state environmental laws and any permits necessary to carry out specific mitigation measures in the HMP approved by the Board. Any reductions in the habitat compensation due to the encroachment preceding CEQA, or due to previous mitigation equivalent to the habitat compensation required herein, or due to the encroachment having occurred after the land involved was converted to irrigated agriculture from native habitat, shall be subject to notice to interested parties. Reductions in habitat compensation may be approved by the Executive Director of the SWRCB unless there are objections. If objections are filed, the SWRCB will decide whether the habitat compensation can be reduced.

4. Permittee shall complete the mitigation identified in the HMP within ten years of the date of this order. An extension for the completion of any remaining mitigation at the end of the ten years may be granted by the Executive Director of the SWRCB after a showing of good cause. At the time of the request for an extension, the Permittee shall be required to provide to the Executive Director of the SWRCB a revised HMP that identifies specific mitigation measures, funding methods and schedules developed in consultation with DFG and the USFWS. The revised HMP must demonstrate the ability of the permittee to complete the mitigation obligation during the extension period. The extension period may not exceed an additional ten years.

5. Permittee, in consultation with DFG and the USFWS, shall develop and fund a Monitoring and Reporting Program (MRP) to ensure the continued protection, preser-

vation or enhancement of special status species' habitats in the mitigation areas. The MRP shall be submitted to the Executive Director of the SWRCB for review and approval within 18 months from the date of this order.

Permittee shall provide annual reports to the Board, DFG and the USFWS that track the ongoing progress of the HMP. The annual reports are due on or before April 15 of each year. The MRP shall continue for a minimum of ten years following the completion of the last mitigation actions identified in the HMP.

Permittee shall file with the Executive Director of the SWRCB a final MRP that demonstrates the Permittee has completed the HMP mitigation actions and has met its mitigation obligation pursuant to the approval of the petition to add the encroachment lands to the Place of Use.

IT IS FURTHER ORDERED that Licenses 990, 2684, 2685, 6047, 11395, and 11396 (Applications 1221, 1222, 1224, 10572, 16186, and 16187, respectively) of the Merced Irrigation District, Licenses 7856 and 7860 (Applications 10872 and 13310, respectively) of the Oakdale and South San Joaquin Irrigation Districts, and Licenses 5417 and 11058 (Applications 1233 and 14127, respectively) of the Turlock and Modesto Irrigation Districts shall be amended by adding the following conditions which shall expire on December 31, 2011 or at such time as the San Joaquin River Agreement (SJRA) is terminated, whichever occurs first.

1. In addition to all other places of use authorized by this license, the reach of river between Licensee's point of diversion and Vernalis on the San Joaquin River is added as a place of use.

2. In addition to all other purposes of use authorized by this license, the purposes of use shall include Fish and Wildlife Enhancement.

3. The flows provided by Licensee pursuant to the SJRA will satisfy any responsibility of Licensee to meet the objectives in Tables 1, 2, and 3, attached. When the SJRA expires or is terminated, the Board will give notice and will commence a proceeding to determine the responsibility of Licensee to meet the objectives.

4. Except as provided below, while the SJRA is in effect, Licensee shall meet the following target flows for the protection of fish and wildlife beneficial uses on the San Joaquin River at Airport Way Bridge, Vernalis during the 31-day pulse flow period in April and May[90] of each year while the SJRA is in effect. The target flow shall be based on the existing flow, as defined below.

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[90] The timing of the 31-day pulse flow is to be determined by the San Joaquin River Technical Committee (SJRTC). The SJRTC is composed of technical experts appointed by the parties to the SJRA to implement the VAMP experiment and other technical activities that its members deem appropriate to meet the goals of the SJRA.

Existing Flow[91] (cfs)	Target Flow (cfs)
0-1,999	2,000
2,000-3,199	3,200
3,200-4,449	4,450
4,450-5,699	5,700
5,700-6,999	7,000
7,000 or greater	Existing Flow

The total amount of water provided under licenses 990, 2684, 2685, 6047, 11395, 11396, 7856, 7860, 5417, and 11058, together, to meet the target flows is not required to exceed 110,000 acre-feet annually. Water provided by the Licensee shall be measured at the Licensee's last point of control.

During years when the sum of the current year's 60-20-20[92] indicator and the previous year's 60-20-20 indicator is seven (7) or greater, target flows shall be one step higher than

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[91] "Existing flows" will be determined by the SJRTC. Existing flow is defined as the forecasted flows in the San Joaquin River at Vernalis during the pulse flow period that would exist absent the SJRA or water acquisitions, including but not limited to the following:

1. Tributary minimum instream flows pursuant to Davis-Grunsky, Federal Energy Regulatory Commission, or other regulatory agency orders existing on the date of this agreement;
2. Water quality or scheduled fishery releases from New Melones Reservoir;
3. Flood control releases from any non-federal storage facility required to be made during the pulse flow period pursuant to its operating protocol with the U.S. Army Corps of Engineers in effect when the SJRA is executed;
4. Uncontrolled spills not otherwise recaptured pursuant to water right accretions (less natural depletions) to the system; and/or
5. Local runoff.

[92] The computation method for the 60-20-20 indicator is provided in Figure 2, attached.

those required by the above table. The Licensee is not required to meet the target flow during years when the sum of the current year's 60-20-20 indicator and the previous two years' 60-20-20 indicator is four (4) or less, using the following table.

SJR Basin 60-20-20 Classification	**60-20-20 Indicator**
Wet	5
Above normal	4
Below normal	3
Dry	2
Critical	1

5. Licensees shall determine the 60-20-20 indicator for each year while the SJRA is in effect, using the table below. The most current DWR forecast of the San Joaquin Valley water hydrologic classification will be used.

6. Licensees shall coordinate water release planning for the April-May pulse flow period with the DWR, the USBR, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the California Department of Fish and Game.

7. Annually, Licensees shall submit an operations report to the Executive Director of the SWRCB by January 30 of the year following each year of operation under the SJRA. The report shall identify (a) the source and quantity of water released from storage, or storage and direct diversions foregone to meet the April-May pulse flow objective in the San Joaquin River at Airport Way Bridge in Vernalis; (b) the time period when this water was released from storage, or not diverted; (c) a monthly accounting of reservoir operations to refill reservoir storage; (d) the source and quantity of water transferred to the USBR pursuant to the terms of the SJRA; (e) the quantity, timing, and location of groundwater extractions

made to maintain water supply deliveries due to the SJRA; (f) the time period in which water sold to the USBR was released from storage or not diverted; and (g) an analysis showing that all storage releases, storage and direct diversions foregone, and replenishment operations listed above were performed within the limits, terms and conditions of these licenses.

8. Licensees shall notify the Board immediately upon termination of the SJRA if such occurs in advance of December 31, 2011.

9. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this long term change order, including method of diversion, method of use, and quantity of water diverted or rediverted, are subject to the continuing authority of the Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

   The continuing authority of the Board also may be exercised by imposing specific requirements over and above those contained in this Order with a view to minimize waste of water and to meet reasonable water requirements without unreasonable draft on the source.

10. The Board reserves jurisdiction over the long-term changes authorized in this Order, to supervise the diversion, release, and use of water under this Order and to coordinate or modify terms and conditions, for the protection of other legal users of water, fish, wildlife, instream beneficial uses, and the public interest as future conditions may warrant. The Board delegates authority to the Executive Director of the SWRCB to take actions under this reservation of jurisdiction when the action is consistent with this Order.

11. This Order does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this Order, the Licensee shall obtain authorization for an incidental take prior to construction or operation. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the long-term changes authorized under this Order.

IT IS FURTHER ORDERED that Licenses 990, 2684, 2685, 6047, 11395, and 11396 (Applications 1221, 1222, 1224, 10572, 16186, and 16187, respectively)* of the Merced Irrigation District be amended by adding the following conditions which shall expire on December 31, 2011 or at such time as the San Joaquin River Agreement (SJRA) is terminated, whichever occurs first:

1. Licensee is authorized to provide 12,500 acre-feet of water above the existing flow delivered at the last point of control for release to the Merced River during October of all years.

2. If groundwater substitution is used in response to meeting flow obligations of Licensee under the SJRA, and the result is exacerbation of groundwater overdraft in the Merced Groundwater Basin, Licensee shall take measures to recharge the incremental increase in the amount of groundwater pumped as a result of the authorized change. Prior to pumping groundwater as a result of the authorized change, Licensee shall provide to the Executive Director of the SWRCB a recharge plan specifying the amount of groundwater to be pumped, the location of the pumping, and the location and method of recharge that will be undertaken to balance the ground-

water pumping. The plan shall contain an analysis of how the recharge program will prevent overdraft or a decrease in flow in the Merced River due to the groundwater pumping. Upon approval of the plan by the Executive Director of the SWRCB, Licensee shall implement the plan.

3. At times when the USBR is releasing water from New Melones Reservoir for the purpose of meeting the Vernalis salinity objective, or when Standard Permit Term 93 is in effect, or when salinity objectives at Vernalis are not being met, Licensee shall not replenish (1) stored water or foregone diversions provided for the April-May pulse flow or the October target flow at Vernalis, or (2) water transferred to the USBR pursuant to the SJRA. The Executive Director of the SWRCB is delegated authority to ensure that this condition is not used by the USBR to increase the obligation of Licensee.

IT IS FURTHER ORDERED that Licenses 7856 and 7860 (Applications 10872 and 13310, respectively)* of the Oakdale and South San Joaquin Irrigation District shall be amended by adding the following conditions which shall expire on December 31, 2011 or at such time as the San Joaquin River Agreement (SJRA) is terminated, whichever occurs first:

1. While the SJRA is in effect, Licensee Oakdale Irrigation District is authorized to provide 15,000 acre-feet of water to the USBR annually. In addition, Licensee is authorized to provide the difference between the water released by the Licensee to meet its share of the San Joaquin River Flow objective and 11,000 acre-feet. Such water may be made available to the USBR at New Melones Reservoir for any authorized purpose of the New Melones Reservoir project while the SJRA is in effect.

2. Licensees shall not extract groundwater from the Eastern San Joaquin County Groundwater Basin to provide water for flow and water transfer obligations of the Oakdale Irrigation District under the SJRA. Also, extractions from this basin shall not be used to replace deliveries foregone due to these obligations.

IT IS FURTHER ORDERED that Licenses 5417 and 11058 (Applications 1233 and 14127, respectively) of the Modesto and Turlock Irrigation Districts shall be amended by adding the following condition which shall expire on December 31, 2011 or at such time as the San Joaquin River Agreement (SJRA) is terminated, whichever occurs first.

At times when the USBR is releasing water from New Melones Reservoir for the purpose of meeting the Vernalis salinity objective, or when Standard Permit Term 93 is in effect, or when salinity objectives at Vernalis are not being met, Licensees shall not replenish (1) stored water or foregone diversions provided for the April/May pulse flow at Vernalis, or (2) water transferred to the USBR pursuant to the San Joaquin River Agreement. The Executive Director of the SWRCB is delegated authority to ensure that this condition is not used by the USBR to increase the obligation of Licensee.

IT IS FURTHER ORDERED that License 11109 and Permit 10478 (Applications 4228 and 13156)* of the East Bay Municipal Utilities District shall be amended by adding the following conditions:

1. Permittee/Licensee shall provide the "Release from Camanche Dam" into the Mokelumne River in accordance with the schedule set forth below. The water year types are defined below.

NORMAL & ABOVE NORMAL YEARS

Mokelumne River Minimum Flow Schedule (1)

FALL RUN CHINOOK SALMON LIFE STAGE	PERIOD	NOTE*	DAYS	RELEASE FROM CAMANCHE DAM (CFS)
Adult Immigration	10/1-10/15	(2)	15	325
Spawn/Incubation	10/16-10/31	(2)	16	325
	11/1-11/30	(3)	30	325
	12/1-12/31	(3)	31	325
Incubation/Alevin	1/1-1/31	(3)	31	325
	2/1-2/28	(3)	28	325
Fry Rearing	3/1-3/31	(3)	31	325
	4/1-4/15	(4),(5)	15	325
	4/16-4/30	(4),(5)	15	325
Fry Rearing/Juvenile Rearing	5/1-5/31	(5)	31	325
Outmigration	6/1-6/30	(5)	30	325
Oversummer	7/1-9/30		92	100

Notes* (1) Due to changes in water conditions or to optimize fishery conditions, EBMUD may modify Flow Standards upon written concurrence of DFG and USFWS, provided the total quantity of water released for fishery purposes in Normal and Above year types is not less than the quantity provided by this flow schedule.

(1) During October, EBMUD will maintain minimum flows of 325 cfs below Camanche Dam and 100 cfs below WID's dam in Normal and Above year types.

(2) During the period when WID dam boards are pulled out and Lodi Lake is empty (approximately Nov. 1 through March 31), EBMUD shall make minimum releases of 325 cfs from Camanche Dam in Normal and Above year types. This release from Camanche dam is expected to provide at least 100 cfs below WID dam during this period. However, EBMUD shall not be obligated to increase releases above 325 cfs during this period in Normal and Above year types.

(3) During April, EBMUD will maintain minimum flows of 325 cfs below Camanche Dam and 150 cfs below WID's dam in Normal and Above year types.

(4) For the months of April, May, and June during Normal and Above year types, additional release of up to 200 cfs is required depending on combined Pardee and Camanche storage levels relative to the maximum allowable for the end of the prior month as follows:

Less than 10 TAF below maximum allowable storage (BMAS), additional release is 200 cfs for subsequent month.

10 TAF <= BMAS < 20 TAF, additional release is 150 cfs for subsequent month.

20 TAF <= BMAS < 30 TAF, additional release is 100 cfs for subsequent month.

30 TAF <= BMAS < 40 TAF, additional release is 50 cfs for subsequent month.

Below Normal Year
Mokelumne River Minimum Flow Schedule (1)

FALL RUN CHINOOK SALMON LIFE STAGE	PERIOD	NOTE*	DAYS	RELEASE FROM CAMANCHE DAM (CFS)
Adult Immigration	10/1-10/15	(2)	15	250
Spawn/Incubation	10/16-10/31	(2)	16	250
	11/1-11/30	(3)	30	250
	12/1-12/31	(3)	31	250
Incubation/Alevin	1/1-1/31	(3)	31	250
	2/1-2/28	(3)	28	250
Fry Rearing	3/1-3/31	(3)	31	250
	4/1-4/15	(4),(5)	15	250
	4/16-4/30	(4),(5)	15	250
Fry Rearing/Juvenile Rearing	5/1-5/31	(5)	31	250
Outmigration	6/1-6/30	(5)	30	250
Oversummer	7/1-9/30		92	100

Notes* (1) Due to changes in water conditions or to optimize fishery conditions, EBMUD may modify Flow Standards upon written concurrence of DFG and USFWS, provided the total quantity of water released for fishery purposes in Below Normal year types is not less than the quantity provided by this flow schedule.

(2) During October, EBMUD will maintain minimum flows of 250 cfs below Camanche Dam and 100 cfs below WID's dam in Below Normal year types.

(3) During the period when WID dam boards are pulled out and Lodi Lake is empty (approximately Nov. 1 through March 31), EBMUD shall make minimum releases of 250 cfs from Camanche Dam in Below Normal year types. This release from Camanche dam is expected to provide at least 100 cfs below WID dam during this period. However, EBMUD shall not be obligated to increase releases above 250 cfs during this period in Below Normal year types.

(4) During April, EBMUD will maintain minimum flows of 250 cfs below Camanche Dam and 150 cfs below WID's dam in Below Normal year types.

(5) For the months of April, May, and June in Below Normal year types, additional release of up to 200 cfs is required depending on combined Pardee and Camanche storage levels relative to the maximum allowable for the end of the prior month as follows:

Less than 10 TAF below maximum allowable storage (BMAS), additional release is 200 cfs for subsequent month.

10 TAF <= BMAS < 20 TAF, additional release is 150 cfs for subsequent month. 20 TAF <= BMAS < 30 TAF, additional release is 100 cfs for subsequent month. 30 TAF <= BMAS < 40 TAF, additional release is 50 cfs for subsequent month.

Dry Year
Mokelumne River Minimum Flow Schedule (1)

FALL RUN CHINOOK SALMON LIFE STAGE	PERIOD	NOTE*	DAYS	RELEASE FROM CAMANCHE DAM (CFS)
Adult Immigration	10/1-10/15	(2)	15	220
Spawn/Incubation	10/16-10/31	(2)	16	220
	11/1-11/30	(3)	30	220
	12/1-12/31	(3)	31	220
Incubation/ Alevin	1/1-1/31	(3)	31	220
	2/1-2/28	(3)	28	220
Fry Rearing	3/1-3/31	(3)	31	220
	4/1-4/15	(4)	15	220
	4/16-4/30	(4)	15	220
Fry Rearing/Juvenile Rearing	5/1-5/31		31	220
Outmigration	6/1-6/30	(5)	30	100
Oversummer	7/1-9/30		92	100

Notes* (1) Due to changes in water conditions or to optimize fishery conditions, EBMUD may modify Flow Standards upon written concurrence of DFG and USFWS, provided the total quantity of water released

for fishery purposes in Dry year types is not less than the quantity provided by this flow schedule.

(2) During October, EBMUD will maintain minimum flows of 220 cfs below Camanche Dam and 80 cfs below WID's dam in Dry year types.

(3) During the period when WID dam boards are pulled out and Lodi Lake is empty (approximately Nov. 1 through March 31), EBMUD shall make minimum releases of 220 cfs from Camanche Dam in Dry year types. This release from Camanche dam is expected to provide at least 80 cfs below WID dam during this period. However, EBMUD shall not be obligated to increase releases above 220 cfs during this period in Dry year types.

(4) During April, EBMUD will maintain minimum flows of 220 cfs below Camanche Dam and 150 cfs below WID's dam in Dry year types.

(5) During June, Outmigrating smolts will be trapped, tagged, and transported around the Delta in Dry year types with approval of the Partnership Steering Committee created under the 1998 Joint Settlement Agreement.

Critically Dry Year
Mokelumne River Minimum Flow Schedule (1)

FALL RUN CHINOOK SALMON LIFE STAGE	PERIOD	NOTE*	DAYS	RELEASE FROM CAMANCHE DAM (CFS)
Adult Immigration	10/1-10/15	(2)	15	100
Spawn/Incubation	10/16-10/31	(2)	16	130
	11/1-11/30	(3)	30	130
	12/1-12/31	(3)	31	130
Incubation/Alevin	1/1-1/31	(3)	31	130
	2/1-2/28	(3)	28	130
Fry Rearing	3/1-3/31	(3)	31	130
	4/1-4/15	(4)	15	130
	4/16-4/30	(4)	15	130
Fry Rearing/Juvenile Rearing	5/1-5/31	(5)	31	100
Outmigration	6/1-6/30	(5)	30	100
Oversummer	7/1-9/30		92	100

Notes* (1) Due to changes in water conditions or to optimize fishery conditions, EBMUD may modify Flow Standards upon written concurrence of DFG and USFWS, provided the total quantity of water released for fishery purposes in Critically-Dry year types is not less than the quantity provided by this flow schedule.

(2) During October, EBMUD will maintain minimum flows of 130 cfs below Camanche Dam and will maintain minimum flows of 15 cfs from Oct. 1-15 and 75 cfs from Oct. 16-31 below WID dam in Critically Dry year types.

(3) During the period when WID dam boards are pulled out and Lodi Lake is empty (approximately Nov. 1 through March 31), EBMUD shall make minimum releases of 130 cfs from Camanche Dam in Critically Dry year types. This release from Camanche dam is expected to provide at least 75 cfs below WID dam during this period. However, EBMUD shall not be obligated to increase releases above 130 cfs during this period in Critically-Dry year types.

(4) During April, EBMUD will maintain minimum flows of 130 cfs below Camanche Dam and 75 cfs below WID's dam in Critically-Dry year types.

(5) During May and June, outmigrating smolts will be trapped, tagged, and transported around the Delta in Critically-Dry year types with approval of the Partnership Steering Committee created under the 1998 Joint Settlement Agreement.

Water Year Type Determination

Year Type	Normal/Above	Below Normal	Dry	Critically Dry
Oct. - Mar. [1] (Pardee/Camanche Storage)	Max Allowable [2]	Max Allowable to 400 TAF	399 TAF to 270 TAF	269 TAF or Less
Apr. - Sep. [3] (Unimpaired runoff)	890 TAF or More	889 TAF to 500 TAF	499 TAF to 300 TAF	299 TAF or Less [4]

(1)October through March minimum flows are determined by total Pardee and Camanche storage on November 5th.

(2) Maximum allowable storage on November 5th, shall be determined in accordance with the Army Corps of Engineer's Water Control Manual for Camanche Dam and Reservoir dated September 1981.

(3) April through September minimum flows are determined by the water year unimpaired runoff into Pardee Reservoir as forecasted by DWR in the April 1 st Bulletin 120 Report except when combined Pardee/ Camanche Nov. 5 storage is projected to be less than 200 TAF.

(4) April through September minimum flows shall be critically dry whenever Nov. 5 combined Pardee/Camanche storage is projected to be 200 TAF or less based on the runoff forecast in DWR Bulletin 120, beginning April 1st.

2. This permit/license does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U. S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the Permittee/Licensee shall obtain authorization for an incidental take prior to construction or operation. Permittee/Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit/license.

(0000014)

3. The continuing authority condition shall be updated to read as follows:

   Pursuant to California Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

   The continuing authority of the Board may be exercised by imposing specific requirements over and above those

contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of Permittee/Licensee without unreasonable draft on the source. Permittee/Licensee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirement for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest; and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

4. The water quality objectives condition shall be updated to read as follows:

The quantity of water diverted under this permit is subject to modification by the Board if, after notice to the Permittee/Licensee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(0000013)

5. Permittee/Licensee may reschedule or modify the specified flow releases required by this order, but the total quantity of water released in any year shall not be less than the quantity of water that would have been provided pursuant to the flow schedule specified in this order for the water year type in which the resheduling or modification occurs. Thirty days prior to rescheduling or modifying the specified flow releases, Permittee/Licensee shall submit to the Executive Director of the SWRCB an operations plan acceptable to the Executive Director of the SWRCB that specifies the release schedule for that year. Permittee/Licensee shall also submit a written concurrence to the operations plan signed by a representative of the DFG and the USFWS.

6. For the protection of fish, Permittee/Licensee shall:

   (a) Make river flow changes gradually. During the October 16 through March 31 spawning and incubation period, flows shall not decrease by more than 50 cfs per day. During other periods, flows shall not

decrease by more than 100 cfs per day. This requirement does not apply during emergency conditions or when flood

(b) Use its best efforts to maintain a minimum of 28 taf of hypolymnetic volume in Camanche Reservoir through October whenever Pardee Reservoir volume exceeds 100 taf.

(c) Take action to maintain dissolved oxygen and to reduce hydrogen sulfide levels in the Camanche Reservoir hypolimnion during the period from May through October by using its Hypolimnetic Oxygenation System (HOS).

IT IS FURTHER ORDERED that the Licenses 5945, 8214, 8215 (Applications 5807, 10240 and 12648) * of the Woodbridge Irrigation District shall be amended by adding the following condition:

1. Licensee shall curtail its diversions at Woodbridge Dam that exceed its Permanent Regulated Base Supply entitlement released from Camanche Dam under its 1965 Agreement with EBMUD adequately to ensure that the following flows are met below Woodbridge Diversion Dam. The minimum bypass will be reevaluated and possibly amended if the Joint Settlement Agreement is amended for the lower Mokelumne River.

Water Year Type Determination

Year Type	Normal/Above	Below Normal	Dry	Critically Dry
Oct. - Mar. [1] (Pardee/Camanche Storage)	Max Allowable [2]	Max Allowable to 400 TAF	399 TAF to 270 TAF	269 TAF or Less
Apr. - Sep. [3] (Unimpaired runoff)	890 TAF or More	889 TAF to 500 TAF	499 TAF to 300 TAF	299 TAF or Less [4]

(1) October through March minimum flows are determined by total Pardee and Camanche storage on November 5th.

(2) Maximum allowable storage on November 5th, shall be determined in accordance with the Army Corps of Engineer's Water Control Manual for Camanche Dam and Reservoir dated September 1981.

(3) April through September minimum flows are determined by the water year unimpaired runoff into Pardee Reservoir as forecasted by DWR in the April 1st Bulletin 120 Report except when combined Pardee/ Camanche Nov. 5 storage is projected to be less than 200 TAF.

(4) April through Septemer minimum flows shall be critically dry whenever Nov. 5 combined Pardee/Camanche storage is projected to be 200 TAF or less based on the runoff forecast in DWR Bulletin 120, beginning April 1st.

Required Flow Below Woodbridge Irrigation District Diversion Dam (cfs) Water Year Type

Required Flow Below Woodbridge Irrigation District Diversion Dam (cfs) Water Year Type				
Period	Normal and Above	Below Normal	Dry	Critically Dry
10/1-10/15	100	100	80	15
10/16-10/31	100	100	80	75
11/1-11/30	100	100	80	75
12/1-12/31	100	100	80	75
1/1-1/31	100	100	80	75
2/1-2/28	100	100	80	75
3/1-3/31	100	100	80	75
4/1-4/15	150	150	150	75
4/16-4/30	150	150	150	75
5/1-5/31	300	200	150	15
6/1-6/30	300	200	20	15
7/1-9/30	25	20	20	15

2. This license does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act author-

ized under this water right, the licensee shall obtain authorization for an incidental take prior to construction or operation. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.

(0000014)

3. The continuing authority condition shall be updated to read as follows:

Pursuant to California Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this license, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this license with a view to eliminating waste of water and to meeting the reasonable water requirements of Licensee without unreasonable draft on the source. Licensee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable

water requirement for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the Licensee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest; and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

4. The water quality objectives condition shall be updated to read as follows:

The quantity of water diverted under this permit is subject to modification by the Board if, after notice to the Licensee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(0000013)

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a decision duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 29, 1999, and revised pursuant to Order WR 2000-02 at a meeting of the State Water Resources Control Board held on March 15, 2000.

Dated: 3/29/00

/s/ Harry M. Schueller
Harry M. Schueller
Chief, Division of Water Rights

STATE WATER RESOURCES CONTROL BOARD

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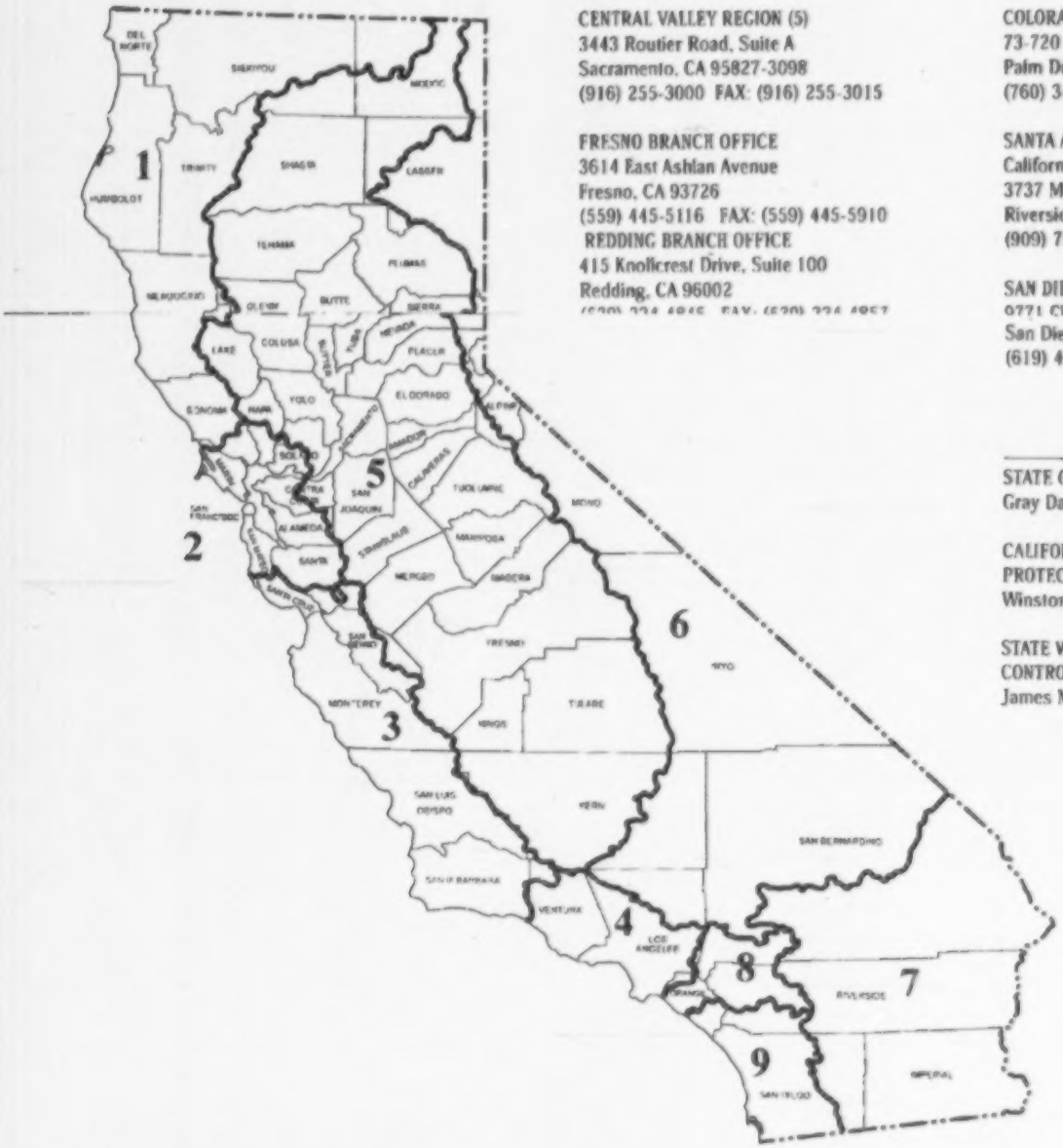

STATE OF CALIFORNIA
Gray Davis, Governor

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
Winston H. Hickox, Secretary

STATE WATER RESOURCES CONTROL BOARD
James M. Stubchaer, Chairman

11/99

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APPENDIX G

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2000-02

In the Matter of Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; A Petition to Change Points of Diversion of the Central Valley Project and the State Water Project in the Southern Delta; and A Petition to Change Places of Use and Purposes of Use of the Central Valley Project,

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ORDER DENYING PETITIONS FOR RECONSIDERATION AND AMENDING SWRCB DECISION 1641

1.0 INTRODUCTION

In this Order, the State Water Resources Control Board (SWRCB) denies reconsideration of SWRCB Decision 1641 (D-1641) and amends D-1641 as provided below. The SWRCB will publish an amended version of D-1641, for the convenience of parties operating under its requirements, that incorporates the changes made in this Order.

On December 29, 1999, the SWRCB adopted SWRCB D 1641. D-1641 includes several actions. First, it implements the numeric flow objectives in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1995 Bay-Delta Plan). This is accomplished through temporary and longer-term changes in the water rights of the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR), a long-term change in the rights of certain water right holders on tributaries of the San Joaquin River, and establishment of the rights of some parties who had reached agreements with other

parties as to their responsibilities to meet the objectives in the 1995 Bay-Delta Plan. Because some parties have temporary responsibilities, continued full implementation of the 1995 Bay-Delta Plan numeric flow objectives will require future action. The temporary changes in the water rights of

* * * *

> "Water appropriated under the Water Commission Act or this code for one specific purpose shall not be deemed to be appropriated for any other or different purpose, but the purpose of the use of such water may be changed as provided in this code." (Wat. Code § 1700.)
>
> "At any time after notice of an application is given, an applicant, permittee, or licensee may change the point of diversion, place of use, or purpose of use from that specified in the application, permit, or license; but such change may be made only upon permission of the board." (Wat. Code § 1701.)

5.1 Can Buyers of Water from an Appropriator Prevent the Appropriator from Changing its Water Rights?

In D-1641, the SWRCB concluded that section 1702 does not prevent the USBR from petitioning for and obtaining approval of changes in its CVP water rights that could have the effect of reducing deliveries to a CVP contractor. This is a narrow ruling, and does not preclude water supply contractors from protesting a change in their water suppliers' water right based on other provisions of law. As is explained in footnote 75 on page 130, water service contractors can file protests based on public interest grounds or on environmental and public trust grounds. They also may file protests to changes proposed by other water right holders based on injury to the water right holder from whom they buy water.

The discussion of section 1702 in D-1641 responded to the claim by Westlands Water District (WWD) that the SWRCB could not approve the USBR's change in its purposes of use

of water under its CVP water right permits. WWD argued that it is the actual water right holder and consequently is the legal user of water delivered by the CVP, and that approval of the change would cause injury to WWD. The injury claim was based on the fact that the USBR has been supplying, and likely will continue to supply, less water to WWD than the full contractual allotment of 1,150,000 acre-feet per annum. The USBR has reduced the amount of water it supplies to WWD primarily because it is using more water for fish and wildlife purposes, purposes that are authorized as a result of D-1641 but were not previously authorized in most of the USBR's water right permits.[5]

The shortage to WWD varies with the year type, but substantial shortages have occurred even in wet years since 1992. The SWRCB examined two main factors in making its findings regarding WWD's protest of the change. First, the SWRCB examined whether approving the change would be the cause of any harm to WWD. The SWRCB concluded that approving the change would not be the cause of harm to WWD, because the USBR already has reduced the amount of water it supplies to WWD in order to comply with requirements under the federal Endangered Species Act by increasing the amount of water it provides for endangered fish.

---

[5] The SWRCB notes that while WWD makes its argument in the context of a protest to the addition of a new purpose of use, the argument would apply with equal force to any additions to the authorized place of use. If the "no injury" rule bars addition of a fish and wildlife purpose of use because a limited supply would be divided among more uses than before, then the "no injury" rule would also bar any additions to the USBR's place of use, including any changes to add "encroachment" and "expansion" lands in WWD's service area to the USBR's place of use, because approval of the change in place of use would add to the acreage sharing a limited supply, to the detriment of irrigation districts or individual farmers whose lands are already entirely within the authorized place of use.

To satisfy its obligations under the federal Endangered Species Act, the USBR must use some of its water for fish and wildlife protection, and the USBR representatives argue that the USBR is bound by federal law to operate in this manner. The USBR witness made it clear that the USBR has been using water to meet fish and wildlife protection obligations in the past few years while reducing the amount of water it makes available to its water supply contractors. In this circumstance, approving the change does not, in fact, cause any harm to WWD because the USBR already has obligations regardless of the SWRCB's action.

Second, the SWRCB considered whether, as a matter of law, a CVP water supply contractor such as WWD can be "injured" within the meaning of Water Code section 1702 if the SWRCB approves a change in the CVP water right permits that allows the USBR to use CVP water for additional purposes that compete with the purposes for which WWD receives and uses water from the CVP. Because WWD based its argument on a claim that it, and not the USBR, is the water right holder, D-1641 analyzes the state and federal legal authorities applicable to WWD's argument. D-1641 concludes that the USBR, not WWD, is the water right holder of the CVP water rights involved. Accordingly, the SWRCB concluded that water service contractors are not injured legal users of water within the meaning of Water Code section 1702. As explained in footnote 75, this does not mean that a water service contractor cannot maintain a protest against a change in water rights or an application for new water rights based on other legal theories, such as public interest or public trust. Under a protest based on a public interest theory, a contractor can raise issues concerning potential impacts on water deliveries. A contractor also can protest a change proposed by another water right holder that would cause injury to the water right holder from whom the contractor buys water. Nor does this conclusion mean that a water service contractor does not use water legally, or that it cannot

pursue against the water right holder any claims that it has based on its contract with the water right holder. This conclusion means, simply, that section 1702 does not prohibit shortages that may be suffered by a water service contractor because the water right holder expands its purposes or place of use.

The SWRCB previously has interpreted the term "legal user of water" as meaning a legally protectible right to use the water in question. (See SWRCB Order WR 95-6, pp. 12-13.) As the SWRCB pointed out in Order WR 99-02, the "no injury" rule in section 1702 is a codification of a common law rule designed to protect the rights of third party water right holders when a water right is changed. (See Code Commission Notes after Wat. Code § 1700, in West's Annotated Code; *San Bernardino v. Riverside* (1921) 186 Cal. 7, 28 [198 P. 784], cited therein; *Ramelli v. Irish* (1892) 96 Cal. 214 [31 P. 41]; *Scott v. Fruit Growers Supply Co.* (1927) 202 Cal. 47 [258 P. 1095, 1098].) The "no injury" rule includes protection of a junior water right holder who would take the water if the senior right holder does not take it or returns a portion of the water to the watercourse. The "no injury" rule codified in section 1702, barring any change that will "operate to the injury of any legal user of the water involved", is a term of art. It does not prevent all changes that would result in harm to a person who is using water and whose use is not illegal. For example, it is well established under the law of return flows that a person who is importing water from another watershed may change the purpose or place of use of those imported waters, even though the change reduces or completely eliminates the supplies available to another water right holder who is legally appropriating the return flows from those imported waters. (*Stevens v. Oakdale Irrigation District* (1939) 13 Cal.2d 343, 90 P.2d 58; *Haun v. De Vaurs* (1950) 97 Cal.App.2d 841, 218 P.2d 996.) The law of return flows illustrates the principle that, to prevent a water right holder from making a change under the "no injury" rule, the

party seeking to prevent the change must have a legal interest that can exist independently of the rights of the water right holder seeking to make the change. WWD's contractual right to use water appropriated by the USBR is dependent on the contract and on the rights of the USBR, and therefore does not provide a basis for finding a violation of the "no injury" rule in section 1702.

Like persons who appropriate return flows and who may be affected by a change proposed by the water right holder who imports the water in question, a water supply contract does not give the water supply contractor a legal interest in the water independent of the rights of the water right holder. Indeed, unlike persons who appropriate return flows from imported water, water supply contractors do not themselves hold any water rights. Water supply contractors have a right to use water only by virtue of their contracts with their water suppliers. In the absence of the contract, a water supply contractor would not have a right to use the water involved. (See *United States v. State Water Resources Control Board, et al.* (1986) 182 Cal.App.3d 145 [227 Cal.Rptr. 167, 198].) The existence and content of the contract is outside the control of SWRCB, and the SWRCB is not in a position to amend its terms or to settle disputes between the water right holder and its customer. The contract does not create a right to divert or use water, except in accordance with the rights of the water right holder, and does not define or alter those water rights. Consequently, the SWRCB concludes that an "injury of any legal user of the water involved" within the meaning of Water Code section 1702 does not include any harm to a contractor whose entitlement to the use of water is dependent on the rights of the water right holder with whom it contracts, unless impacts on the water right holder would bar the transfer under the "no injury" rule. If a water right holder proposes or agrees to the change, neither the water right holder nor any contractor whose entitlement to water deliv-

eries is dependent on the water right holder has suffered injury within the meaning of Water Code section 1702.

Of course, a contractor may protect its interests when a proposed appropriation or a proposed change would impact the contractor's receipt of water from the water right holder, and the proposed appropriation or change would deprive the water right holder of water to which it is entitled. D-1641 recognizes this right. The State Water Contractors argued, however, that the first sentence in the last paragraph of text on page 130 of D-1641 could be read as denying that contractors have standing to protect their interests during a water right hearing, notwithstanding the explanation in footnote 75. Accordingly, the State Water Contractors request that the SWRCB clarify the sentence. The State Water Contractors suggest clarifying language that includes moving the statement in footnote 75 to the text. The SWRCB will replace the sentence with the requested language. Footnote 75 will be deleted because it would be repetitive. The last paragraph starting on page 130, is amended to read:

> "*In view of the foregoing discussion, the SWRCB finds that section 1702 is not an appropriate basis for WWD to raise this issue, which essentially is a dispute between a contractor and its water supplier. This decision does not preclude water service contractors from protesting changes in existing water rights or applications for new water rights. Such contractors can file protests based on public interest grounds or on environmental and public trust grounds. Water service contractors may also file protests based on injury to the water right holder on whom they rely for deliveries under their water service contracts. Application of the "no injury" rule is not the proper basis for determining contractual or other claims between a water service contractor and the water right holder who supplies water under contract where those claims are not based on the proprietary water rights of*

the water service contractor. Where a water right holder proposes or agrees to a change, there can be no injury to that water right holder. Therefore, where a change is proposed by a water right holder, any protest based on the potential for reduced deliveries to water service contractors, whose contractual entitlements are dependent on the water rights of the water right holder, must be based on other legal grounds. The petitioned change of purpose of use will allow the USBR to operate efficiently without violating its water right permits. Accordingly, the petitioned change of purpose of use is approved."

Finally, any shortage that may be suffered by WWD is not the result of D-1641. Where the USBR, as a water supplier, has legal obligations that conflict with its contractual obligations, and it chooses to satisfy its legal obligations by actions that lead to a reduction in the amount of water available to its contractors, it is the USBR that makes the decision to reduce the amount of water supplied to the contractors, not the SWRCB. By authorizing additional purposes of use under the USBR's water rights the SWRCB does not mandate that the USBR use water for the additional purposes. Accordingly, WWD is misguided in its attempt to treat the SWRCB's action as the cause of any shortages it is suffering or will suffer due to the USBR's decision to shift water supplies from WWD to fish protection.

APPENDIX H

TESTIMONY OF CONNIE L. RUPP

Regarding the Petition to Change Places of Uses and Purposes of Use of the Central Valley Project

INTRODUCTION

My testimony discusses the points of the updated Consolidated Place of Use (CPOU) petition filed by Reclamation in 1985. The petition has been amended several times since 1985. A major reduction in the scope of our proposed change was requested on June 15, 1995. In making that request, Reclamation changed the fundamental basis for analysis of our change request. In 1985, Reclamation intended to expand the place of use so that the boundary location would match section lines and include approximately 4,000,000 acres within the Central Valley Project (CVP) gross area boundary. In 1995, however, Reclamation amended its request so that the boundary would now only be changed to conform to the authorized service areas of districts with existing long-term water service contracts with Reclamation. The acreage involved in the change petition was thereby reduced to 834,667 acres.

Statement of Purpose

The purpose of this testimony is to offer a brief history of the CVP, describe the three parts of Reclamation's CPOU petition and explain why Reclamation feels the changes requested in this petition should be, for the most part, considered an administrative change within the scope of the original intent of the CVP as envisioned in the state water plan.

History of the CVP

It is important to remember that the CVP was conceptualized and authorized by the State Legislature before Federal Government involvement. In particular, the State

Legislature in section 11126 of the California water code, said that because of the benefit of the CVP to the people of the State, the provisions of this part shall therefore be liberally construed to effectuate the purposes and objects thereof. .A history of the Central Valley Project through the 1970s is presented in DOI Exhibit 13b.

I stated earlier that this testimony involves the petition filed in 1985. Reclamation long ago recognized that there were conflicts between our water right permits and actual operations of the CVP. Reclamation initially filed a petition to correct those problems in 1959. DOI Exhibits 13c and 13d explain that the petition at that time was not acted upon due to objections raised by certain interests in the Sacramento and San Joaquin Valley. Those interests filed a lawsuit which prevented any SWRCB action on the petition. The lawsuit was dismissed in 1980. At that time Reclamation made corrections to the 1959 petition and filed the 1985 request. A copy of the 1985 petition is designated as Staff Exhibit 4a.

D-990, adopted by the State Water Rights Board on February 9, 1961, describes the CVP on page 5:

> *For many years it had been the ambition of those people concerned with water development in the State to construct a project capable of exporting surplus water from the Sacramento Valley into the San Joaquin Valley and, at the same time, provide a supplemental supply for those water users in the Sacramento Valley dependent upon the natural stream flow. A plan to accomplish this was formulated by State engineers and later adopted by the Legislature in 1933 as the Central Valley Project Act. In 1927 and 1938 pursuant to Chapter 286, Statutes of 1927 (now codified as Division 6, Part 2 of the Water Code), the State made applications to appropriate water for the Project.*

When it became apparent that the State was unable to finance the necessary construction works, the United States, with the urging of the State, directed the Bureau to undertake construction and operation of the Project. Later, eight of the nine applications involved in this decision (Application 10588 was filed by the United States) were assigned to and completed by the United States.

PART 1. THE SWRCB SHOULD CONFORM THE PURPOSES OF USE IN OUR PERMITS.

Reclamation received assignments of state-filed applications or filed applications for water rights in accordance with acceptable practices at the time the various facilities of the CVP were being planned. It was necessary at the time to request separate permits for different beneficial uses. With the magnitude of the CVP and its integrated operations, however, it is not practical to try to match up a particular beneficial water use to a specific permit. In addition, in 1992, Congress passed the Central Valley Project Improvement Act (CVPIA), which amended the CVP authorizations to include fish and wildlife mitigation, protection and restoration purposes. Consequently, it is important that all of the CVP permits in this petition include the state-defined beneficial use of "fish and wildlife preservation and enhancement" to maximize operational flexibility in order to comply with the CVPIA. Reclamation requests that the 16 CVP permits in this petition be amended so that each permit includes the following beneficial uses: irrigation, domestic, municipal, industrial, frost protection, heat control, fish and wildlife preservation and enhancement, salinity control, water quality control, stockwatering and recreation. No changes in operations are contemplated as a result of this request. The Central Valley Project will continue to be operated according to federal legislation including the CVPIA and our water service and settlement contractual arrangements as well as our permit conditions.

PART 2. THE SWRCB SHOULD CONSOLIDATE THE AUTHORIZED PLACE OF USE FOR THE 16 PERMITS.

Reclamation requests that the place of use maps for the various permits associated with the five facilities involved in this petition be modified to reflect the areas where water from a particular facility may actually be delivered. The current maps with the proposed revisions are included in the Draft EIR as Figures 2-i thru 2-5. This change would recognize the integrated operation of the CVP and the fact that water from multiple CVP facilities is commingled. Once that commingling occurs, it is not practical to segregate and physically account for water distribution from a particular facility.

The CVP was always envisioned as a comprehensive, integrated plan for full use of the water resources of the Central Valley Basin as explained in, *Central Valley Basin, A Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin, and Comments from the State of California and Federal Agencies.*[1] Pages 6 and 7 of that report discuss the importance of the development of the water resources and it is described as being vital to not only the people of California but the nation as a whole. It discusses the unprecedented population and economic growth of the west coast area and the increasing demands for agricultural products. Pages 311 thru 424 of the report contain the comments of the State of California. The comprehensive, integrated nature of the proposed development plan was supported by the State in its comments.

Reclamation initially requested one place of use map to cover all 16 permits. In a fax request dated January 25, 1995, Dave Cornelius of the SWRCB staff proposed that we instead provide five maps, DOI Exhibit 13e. The place of use under a particular permit would then become the area within the

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[1] Senate Document 113, Eighty-first Congress, First Session, August 1949.

overall CVP map where water could physically be distributed from the facility associated with that permit. Although it would have been simpler from an administrative perspective to maintain only one map showing the integrated CVP place of use, Reclamation understood the SWRCB staff's desire to be as accurate as possible in describing the water delivery under a particular permit—which is issued relevant to a facility. Therefore, Reclamation is requesting that the appropriate one of the five maps be attached to each of the 16 permits. Reclamation requests that the SWRCB recognize the integrated nature of the CVP and grant approval for the revised place of use maps for the facilities and associated permits. No changes in operations will occur as a result of this action and Reclamation will continue to consult under the ESA prior to approving transfers of CVP water.

PART 3. RECLAMATION REQUESTS THAT THE BOUNDARY OF THE EXISTING PLACE OF USE BE CORRECTED TO INCLUDE THE PRESENT AUTHORIZED SERVICE AREAS OF THE DISTRICTS WHICH RECEIVE CVP WATER.

This part of Reclamation's petition has generated the most controversy and has also been the most difficult for us to explain. If you examine the map from the petition filed in 1985, you can clearly see that the proposal included an expanded gross area boundary. The map is included in Appendix A of the DEIR and identified as A-20. The dotted line depicts the existing place of use boundary line and the solid lines represent the proposed place of use boundary line which was drawn in an attempt to establish a legally definable place of use line. When you look at this map, it does not seem like the increased area covers very much land. However, the existing place of use for the CVP has a gross area of approximately 13,000,000 acres. Because of the size of the CVP, when all of the proposed area was totaled, the new boundary line added approximately 4,100,000 acres. Addi-

tionally, this initial petition included lands which were not presently within the authorized service areas of our water districts. So, the 1985 petition was a true expansion of the potential service area of the CVP.

When the petition was noticed to the public in 1986 with that kind of increased acreage, several protests were filed. Although Reclamation had not thought of the proposal as a significant change, the public had that perception.

Reclamation proposed the change so that we would have a legally defined boundary for the CVP. The existing CVP boundary line is not legally defined. The significance of the boundary line must depend on whether there is a legal description for the line. For example, an individual landowner who applies for an appropriative water right, has the place of use defined as the legal boundary of the property which is recorded with the county.

It is probably fairly easy to estimate the net acreage that an individual landowner would plan to irrigate within the gross property boundary line. Similarly, if I represented a water district, I would have a legal service area boundary which is established under state law and recorded with appropriate state/local agencies. If I requested an appropriative right, I would again request the gross area be defined as my legally authorized service area. I would, of course, realize that some areas within my district could not be developed, but nonetheless, I would request that my gross area boundary would match my legal service area. Then, I would specify the estimated net acres which might be irrigated under the proposed appropriative water right.

However, the CVP has no legally-recorded service area boundary line. Even when the various decisions and permits were issued for the CVP, there was no legally-described boundary line. The maps submitted to the state with our applications included a planning line. Then, Reclamation later

contracted with districts and other entities to provide our water rights water to them for distribution and beneficial use within their legal boundaries.

The closest comparable project to the CVP in California is the State Water Project. I understand that for the State Water Project, the Division of Water Resources decided, for the most part, to use county lines for their estimated place of use boundary. This results in a much larger gross boundary than the net service area. See the place of use map for the State Water Project[2] presented as DOI Exhibit 13f. The CVP gross place of use area which would have been our legal boundary if we had chosen to request a boundary according to county lines is shown on DOI Exhibit 13g. If we had used county lines, we could then have used those legal lines when we contracted with districts and made a factual determination of whether the district was within the authorized place of use. In that case, the gross service area boundary would have included the following 23 counties: Shasta, Tehama, Glenn, Butte, Colusa, Sutter, Yolo, Sacramento, Solano, San Joaquin, Contra Costa, Alameda, Santa Clara, San Benito, Kern, Tulare, Kings, Fresno, Madera, Merced, Stanislaus, Placer and Yuba. The permitted place of use would have included almost 37 million acres. Reclamation did not use county boundary lines to define the gross place of use line and is not proposing to do so now.

The planning lines included with our various applications came from field surveys conducted by Reclamation identifying lands under irrigation and potentially irrigable lands. That data was included in the 1949 Senate Document referenced earlier. A map is included at page 60 of that Departmental Report. Reclamation will use an enlarged version of the map included in the DEIR as Figure 3-1 as a reference. If

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[2] Department of Water Resources, State of California, The California State Water Project, page 6 of brochure.

you follow the contours on the map dated January 1945 and compare it to the map included in the DEIR as Figure 3-1, the CVP gross area boundary line appears to be derived from the earlier map.

By using that 1949 map as the basis for our gross boundary line, Reclamation focused on defining the potential service areas for irrigation and not other purposes. As a result, the boundary may have been too conservative because we apparently did not survey and include potential service areas for municipal and industrial use or other beneficial uses. Of course, the focus of Reclamation in those days was on providing water for irrigation. Other purposes were considered secondary. So, the proposed gross area boundary line was consistent with. Reclamation's main purpose at the time.

In 1985, Reclamation was proposing a boundary line for the CVP which could be used as a legally-defined line. We didn't think the expansion to county lines was appropriate because of the increased acreage. Instead, we defined the boundary line according to nearby township, range and section lines. The initial SWRCB notice for the CPOU petition included this legally-defined line and requested an expanded place of use. However, in 1995, Reclamation amended its petition and reduced the request to only incorporate the current district service area boundaries and our action is now one of conformance. Through our GIS system, Reclamation has digitized a line using the existing boundary lines on the maps submitted with our various CVP applications. However, we never had a legal description of the line and we still do not have a legal description for the line. Reclamation believes that it is inappropriate to use those lines as the basis for analyzing the authorized place of use. In examining the orders associated with the CVP permits, the SWRCB authorized use of CVP water within district service areas at the time initial long-term contracts were signed with Reclamation. Also, in some cases, the SWRCB did not request Reclamation to file

change petitions if the districts later annexed additional lands into their service areas. Pursuant to those conditions, it would have been appropriate for Reclamation to amend its place of use maps in 1995 to reflect the service areas previously authorized through SWRCB conditions and only addressed in this petition those areas for which the SWRCB required us to file change petitions.

The present service areas of 26 of our contractors have some lands outside of the existing place of use boundary as now defined by our GIS system. Considering that we did not have many water service contracts in place when the proposed boundary line was drawn, the fact that only 26 out of over 220 service areas included acreage outside the boundary, illustrates that our gross boundary line in most instances was adequate to encompass the entire district service areas. Then, when you examine the boundaries of the 26 districts, in most cases, you realize that the vast majority of the district service area is already included within the existing place of use boundary. The districts with extensive areas outside of the original estimated place of use line are districts whose CVP contracts are for municipal & industrial water service as opposed to irrigation. Those districts are El Dorado, SMUD, Santa Clara, Coalinga and Avenal with a total area outside the place of use at 746,093 acres or 89% of the total 834,667 acres outside the place of use.

Part 3a. The SWRCB has already authorized use of CVP water in some of the areas identified in the CPOU DEIR as being outside of the place of use.

The Order associated with D-990, adopted February 9, 1961, beginning at page 80, specified that permits issued for applications associated with Shasta consumptive uses (5626, 9363, 9364), Contra Costa—Rock Slough consumptive uses

(9366 and 9367), and Delta Mendota Canal (9368) include the following conditions:

Condition 23 (Sacramento River)

> *23. The export of stored water under permits issued pursuant to Applications 5626, 9363 and 9364 outside the watershed of Sacramento River Basin or beyond the Sacramento-San Joaquin Delta shall be subject to the reasonable beneficial use of said stored water within said watershed and Delta, both present and prospective, provided, however, that agreements for the use of said stored water are entered into with the United States prior to March 1, 1964, by parties currently diverting water from Sacramento River and/or Sacramento-San Joaquin Delta and prior to March 1, 1971, by parties not currently using water from Sacramento River and/or Sacramento-San Joaquin Delta.*

A footnote on page 85 of D-990, included as Staff Exhibit 5b, defined the Sacramento River Basin. DOI Exhibit 13h shows the exterior boundary of the Sacramento River Basin watershed in red and the existing boundary of the CVP place of use in blue.

Reclamation interprets Condition 23 as specifying a special boundary to protect the watershed area as long as contracts were entered into within the time constraints of the Condition. Furthermore, there is no requirement in the Condition for filing change petitions if the service areas of those districts were expanded in the future.

Condition 29 (Sacramento River)

> *29. Subject to the existence of long-term water delivery contracts between the United States and public agencies and subject to compliance with the provisions of said contracts by said public agencies, the permits issued on*

Applications 5626, 9364, 9366 and 9368 shall be further conditioned as follows:

(a) The right to the beneficial use of water for irrigation purposes, except where water is distributed to the general public by a private agency in charge of a public use, shall be appurtenant to the land on which said water shall be applied, subject to continued beneficial use and the right to change the point of diversion, place of use and purpose of use as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California and further subject to the right to dispose of a temporary surplus.

Condition 29 only requires a change petition for irrigation purposes if the district changes the place of use after a long term contract is entered into with Reclamation and that annexed area is outside of the existing place of use. Because we had no legally-defined boundary, in most cases we could not determine at the time we entered into the long term contracts whether or not the entity was totally within the existing place of use.

The SWRCB may have recognized that Reclamation could not foresee the exact boundaries of potential CVP contractors. Or, perhaps the Conditions were included because SWRCB action on the 1959 petition was prevented because of an ongoing lawsuit. In any case, there was no requirement in the Condition, that before water could be served under the contract, the entire district service area must be within the existing place of use. Condition 29 does not require Reclamation to take any action until the district plans to change its boundary from that which existed when it entered into its water service contracts with Reclamation and wants to add lands outside of the place of use.

The Order associated with Decision 893, adopted on March 18, 1958, beginning at page 69, required that permits for the

American River applications contain similar provisions. Conditions 12 and 13 in the permits state:

Condition 12 (American River)

> *12. The right to divert and store water and apply said water to beneficial use as provided in this permit is granted to the United States as Trustee for the benefit of the public agencies of the State together with the landowners and water users within such public agencies as shall be supplied with the water* appropriated *hereunder.*

Condition 13 (American River)

> *13. Subject to compliance by the public agencies concerned with any and all present and future valid contractual obligations with the United States, such public agencies, on behalf of their landowners and water users, shall, consistent with other terms of this permit, have the permanent right to the use of all water appropriated and beneficially used hereunder, which right, except where water is distributed to the general public by a private agency in charge of a public use, shall be appurtenant to the land to which said water shall be applied, subject to continued beneficial use and the right to change the point of diversion, place of use, and purpose of use as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California, and further subject to the right to dispose of a temporary surplus.*

Conditions 29 (Sacramento River) and 13 (American River) authorize water delivery within the original district service areas because that was the service area defined in the contracts. Condition 23 (Sacramento River) actually allowed an expanded place of use area without requiring Reclamation to file a change petition as long as the expanded area was within the Sacramento River Basin and the districts fulfilled their respective contractual obligations.

At this time I'll begin a brief analysis of the 26 districts which have some lands outside of the existing place of use to point out the original contract service areas, identify specific district circumstances, and explain how the DEIR analysis is affected by applying the above conditions. The key reference map will be DOI Exhibit 13i. This map depicts the service areas of the 26 districts. The green area is the district's service area at the time of the initial water service contract with Reclamation. The red line is the existing place of use boundary line. The pink areas are lands which have been subsequently annexed to the districts. In addition, DOI Exhibit 13j identifies the water district, the applicable permit term(s), and the number of acres appropriate for environmental analysis. Beginning at the top of the map:

Sacramento River, Condition 23 districts: Twelve districts fall under the Condition 23 criteria. These districts require no environmental analysis prior to a SWRCB decision.

Sacramento River, Condition 29 districts:

Anderson-Cottonwood Irrigation District has stated that the 230 acres listed in the DEIR as being outside of the place of use have actually been in the District since 1915. Therefore, those acres were in the District at the time of Reclamation's initial long term contract in 1967. No environmental analysis is required prior to a SWRCB decision.

Glenn Valley Water District has 248 acres currently listed in the DEIR as outside the place of use. The current service area boundary is the same as the original contract boundary. They became eligible to receive CVP water through a subcontract with Colusa County in 1980. No environmental analysis is required prior to a SWRCB decision.

American River, Condition 13 districts:

El Dorado Irrigation District (EDID) has a special service area defined for municipal and industrial water from Folsom

Reservoir. The original service area is depicted on DOI Exhibit 13k as the black and white cross-hatched area. The green cross-hatched areas are lands which were subsequently annexed and currently receive CVP water. The orange cross-hatched area is annexed but does not currently receive CVP water. These areas total 1,176 acres of land which were subsequently annexed and are appropriate for environmental analysis prior to a SWRCB decision.

Sacramento Municipal Utility District (SMUD) entered into a water service contract with Reclamation in 1970 to support the proposed Rancho Seco nuclear power plant. The area today is the same as the original contract boundary. No environmental analysis is required prior to a SWRCB decision.

East Bay Municipal Utility District (EBMUD) signed its long term contract with Reclamation on December 22, 1970. The area designated in the DEIR as being outside the place of use is within the original contract service area. No environmental analysis is required prior to a SWRCB decision.

Delta/Rock Slough, Condition 29:

Contra Costa Water District contract was signed on September 18, 1951. Since that time the only land annexed which is outside of the existing place of use is a portion of Alameda County. That 932 acres of land in Alameda County should be analyzed prior to a SWRCB decision.

Del Puerto Water District signed a long-term water service contract on June 10, 1953. It has since merged with several other water districts. Only 1,000 acres of the current District's service area are identified in the DEIR as being outside of the existing place of use. In light of the recent merger, it is possible that all of the lands currently in the DEIR were within the original service areas of the boundaries of the merging districts. However, because of the small size and number of districts, Reclamation is willing to assume that all

of the lands were annexed after original contracts were signed. Therefore, the 1,000 acres should be analyzed prior to a SWRCB decision.

Santa Clara Valley Water District contract was signed on June 7, 1977. Santa Clara's service area has always been Santa Clara county even though it is not likely that water can be delivered to much of the area due to mountainous terrain. No environmental analysis is required prior to a SWRCB decision.

San Benito County Water District signed its contract on April 15, 1978. Although the District service area is the entire county, the present service area for CVP water is zone 6 of the District. That zone was defined in a Master Plan Report filed in July 1977 by Creegan & D'Angelo and McCandless consulting engineers. No additional areas have been added to the area as defined in the 1977 planning map. No environmental analysis is required prior to a SWRCB decision.

San Luis Water District first entered into a long-term water service contract on June 18, 1974. According to a 1971 map of the service district boundary most of the lands listed in the DEIR as being outside of the CVP existing place of use were within the original district boundary in 1974. Only about 230 acres have been annexed which are outside of the existing place of use boundary since the original contract. See DOI Exhibit 13_ which shows the current service area boundary as a red line. The original contract service area includes some solid yellow areas which have since been excluded from the service area. The three green areas are the 230 acres which were annexed. Those 230 acres would require environmental analysis prior to a SWRCB decision.

The City of Coalinga first entered into a long-term water service contract on October 28, 1968. See DOI Exhibit 13m which identifies the original service area with a red boundary line. The yellow cross-hatched area is the service area.

According to a service area map from 1966, the City's service area at that time did not include some of the area served by Pleasant Valley Water District. The irrigation service area for Pleasant Valley Water District is identified as green. It also appears that other sections have been subsequently annexed. Environmental analysis is appropriate for the 28,997 acres not included within the original contract boundaries prior to a SWRCB decision.

The City of Avenal first entered into a long term water service contract on November 20, 1969. The Avenal service area has been modified somewhat to include four sections of land along the southern border shown on DOI Exhibit 13n. The 2,560 acres which should be subject to environmental analysis prior to a SWRCB decision are the three cross-hatched sections which have been subsequently annexed and the additional solid pink section, part of an existing waste disposal site, which the City is annexing.

Special analysis for Westlands Water District:

The issue with Westlands Water District involves the analysis of Westplains Water Storage District and what happened as a consequence of the Westlands merger. Most of the acreage presently shown as outside of the CVP existing place of use was within the authorized service area of Westplains Water Storage District in 1965. Reclamation's original long-term contract with Westlands was signed in 1963. A letter and resolution from Westplains Water Storage District to the Department of Water Resources, dated October 15, 1963, is submitted as DOI Exhibit 13o. This letter stated in part:

> *. . . due to the location of the Federal service area, the District has been split with the result that the western portion, which is at the highest elevations above the main canal, is the only area in which State water legally could be delivered. Such service to this portion of the*

District lacks economic feasibility, and it appears that the yield of the Federal San Luis Unit is insufficient to provide the service required by the District or even that portion of its area lying within the Federal service area. If the service area were to be determined today, the area of the District would either be wholly within the Federal service area or wholly within the State service area. To avoid penalizing the District and to carry out what we believe to have been the intent of both the Federal and State agencies will require the cooperative effort of your Department and the United States, Department of Interior, Bureau of Reclamation.

The Resolution states:

. . . the Board of Directors of the WESTPLAINS WATER STORAGE DISTRICT does hereby urgently request the Bureau of Reclamation to do all things necessary to acquire or develop a sufficient amount of water to enable it to fully and properly serve the needs of the entire District from the Federal Central Valley Project at the earliest possible date; . . .

Reclamation did begin negotiations for a long-term water service contract with Westplains. However, that contract was never signed. Instead, in 1965, the Westlands Water District merger occurred. The legislation authorizing the merger is found at Chapters 1 through 3 of Part 8.1 of Division 13 of the California water code. Section 37801 states:

The state and the people thereof have a primary and supreme interest in securing to the inhabitants and property owners within and adjacent to the federal service area of the San Luis unit of the Central Valley project now under construction by the United States the greatest possible use and conservation of the waters to be made available from said unit and the greatest use thereof to the area, thereby assuring that the greatest

produ[illegible]y of the largest possible area may be accom[illegible]ied and safely carried on within reasonable limits of economy.

Section 37802 states:

Investigation having shown that conditions in and surrounding the federal service area of the San Luis unit of the Central Valley project are peculiar to that area, it is hereby declared that general law cannot be made applicable thereto and that this part is therefore necessary for the proper distribution, use, and control of the natural supplies of water now available for said area and of the water to be made available from the San Luis unit of the Central Valley project, and for elimination of duplication of governmental authority, the securing of greater economy of administration, and the more efficient and effective utilization of ground water and imported water supplies.

Based on the above historical perspective and the state's legislative directives, Reclamation believes that no environmental analysis is required for the inclusion of the Westplains service area into the CVP place of use. The boundary of Westlands Water District after the Westplains merger is identified with a red line on the map included as DOI Exhibit 13p. The green areas receive CVP water. The orange areas were identified in the DEIR as native vegetation. The green and orange areas totaling 12,985 acres require environmental analysis prior to a SWRCB decision.

Special analysis for Arvin-Edison Water District:

Arvin-Edison Water Storage District has had a long-term contract with Reclamation since August 30, 1962. Although the contract is for service from the Friant Division, Arvin-Edison in fact receives water from the Delta and provides its Friant water to contractors along the Friant-Kern Canal.

In light of that fact, it is appropriate to examine Condition 11 of the Friant permits which states:

> *11. Subject to the existence of long-term water delivery contracts between the United States and public agencies and subject to the compliance with the provisions of said contracts by said public agencies, these permits are further conditioned as follows:*
>
> *(a) The right to the beneficial use of water for irrigation purposes, except where water is distributed to the general public by a private agency in charge of a public use, shall be appurtenant to the land on which said water shall be applied, subject to continued beneficial use and the right to change the point of diversion, place of use, and purpose of use as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California and further subject to the right to dispose of a temporary surplus.*
>
> *(b) The right to the beneficial use of water for irrigation purposes shall, consistent with other terms of this permit, continue in perpetuity.*

The Arvin-Edison service area is presently in the place of use for the Trinity permits for water service from the Delta. Condition 12 of the Trinity permits for applications 15374 and 15375 states:

> *12. Subject to the existence of long-term water delivery contracts between the United States and public agencies and subject to the compliance with the provisions of said contracts by said public agencies, this permit is further conditioned as follows:*
>
> *(a) The right to the beneficial use of water for irrigation purposes, except where water is distributed to the general public by a private agency in charge of public use, shall be appurtenant to the land on which said*

water shall be applied, subject to continued beneficial use and the right to change the point of diversion, place of use, and purpose of use as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California and further subject to the right to dispose of a temporary surplus.

(b) The right to the beneficial use of water for irrigation purposes shall, consistent with other terms of this permit, continue in perpetuity.

An Arvin-Edison place of use map from April, 1962, shows that the District service area listed in the DEER as being outside of the place of use was actually within the service area at the time of its original contract with Reclamation. No environmental analysis is required by the SWRWB.

Part 3b. Appropriate Environmental Analysis for the SWRCB of the Seven Districts Whose Boundaries Have Charmed:

Contra Costa Water District—The 932 acres added to Contra Costa Water District in Alameda County were included as part of a mitigation requirement associated with the Los Vaqueros Project. These lands are protected from development. No future environmental analysis or mitigation is required for inclusion of these lands into the CVP place of use.

Del Puerto Water District—The DEIR stated that the 1,000 acres of land had been cultivated prior to receiving Project water according to District records. The DEIR did not identify any mitigation requirement for the lands in Del Puerto Water District.

City of Coalinga—The Coalinga land analysis includes 28,997 acres which were not included in the original contract service area. Of that total, 19,186 acres are due to inclusion of portions of the Pleasant Valley Water District. Those lands receive domestic water service from the CVP contract.

Coalinga delivers potable water to homes in the area because of the problems with the groundwater quality. Of the remaining 9,811 acres, 2,246 were developed for m&i purposes and currently receive CVP water. Reclamation agrees with the findings in the DEIR which did not identify any mitigation requirement for the 21,432 acres which have received CVP water.

Those lands remaining, 7,565 acres, which are presently undeveloped (identified in the DEIR as expansion lands) can only be developed with appropriate local land use environmental documentation. Coalinga is the lead agency for the Habitat Conservation Plan which is in the final review process prior to implementation. Reclamation supports the position stated by the City of Coalinga in its comments to the DEIR. Reclamation believes that no future environmental documentation should be required by the SWRCB as a condition of including the Coalinga service area in the CVP place of use.

City of Avenal—The Avenal service area includes 2,560 acres which were added after the original contract with Reclamation. Section 34 of T22S RISE and Section 3 of T23S R18E are designated as CVP municipal & industrial use and are considered encroachment lands in the DEIR. That is the location of their waste disposal facility that was described in the DEIR.

Even though Section 3 is not presently in the service area, Reclamation is requesting that it be included at this time. Some CVP water is used in that section as part of the waste facility processing. No mitigation was identified for the encroachment lands in the DEIR.

Avenal historically uses all of its CVP water supply so future development of any lands would be minimal unless another water supply was found. The lands identified in the DEIR as expansion lands include 789 acres with a current use

of dryland agriculture. Only 491 acres are classified as native vegetation. Avenal's contract does not allow CVP water to be used for irrigation. Any land use changes proposed by the city would have to comply with local land use regulations. Reclamation agrees with the statements made by the City of Avenal in its comments to the DEIR. Reclamation believes that no future environmental analysis should be required by the SWRCB as a condition of including the proposed area in the CVP place of use.

El Dorado Irrigation District—Most of the service area is included in the original contract. Only 1,176 acres were subsequently annexed. Of that, 965 acres are presently receiving CVP water. Reclamation agrees with the findings in the DEIR which determined that no environmental mitigation was required for the lands receiving CVP water.

The EDID service contract is limited to m&i use. Only 211 acres are identified as presently undeveloped. Any future land use changes would require appropriate environmental documentation for municipal & industrial use under local land use regulations. Reclamation believes that no future environmental analysis should be required by the SWRCB as a condition of including the proposed area in the CVP place of use.

San Luis Water District—The San Luis service area has annexed 230 acres outside of the existing place of use boundary since its original contract with Reclamation. Reclamation has located documents which show the history of the annexations. In 1979, San Luis Water District included 160 acres in the NE 1/4 of Section 24, Township 11 South, Range 10 East. The lands had not previously been developed for irrigation but were used for sheep and cattle grazing. The owner has developed the land to a drip irrigation system and is using it for grapes. At the same time, San Luis Water District excluded 160 acres from their service area. Those acres were located in the south half of Section 17, Township 13 South, Range 11 East. Those Section 17 lands were

included in the original contract service area for San Luis Water District. In 1989, San Luis Water District annexed an additional 70 acres. At the same time, a similar acreage was excluded from the District. The listed purpose of the annexations and exclusions was to conform the District boundaries to include lands that can be served with existing distribution systems and exclude lands that could not be served with existing facilities. Reclamation determined at the time that the annexation/exclusion would not have any significant impacts on the environment. These 230 acres presently receive CVP water.

Westlands Water District—Approximately 12,985 acres outside of the permitted place of use area have been annexed to Westlands Water District since the merger with Westplains. Westlands Water District presently uses all of its contract supply. Reclamation was able to find the following information on the annexations:

Reclamation examined various inclusion records for the District, correspondence files, land classification reports, Department of Water Resources land use reports, and aerial photographs. Because of the extensive compilation of historical records, Reclamation has not included all of these documents as evidence. However, they are available for review upon request.

The records show that 5,277 acres were annexed and approved for water service from the Westlands Water District prior to the enactment of CEQA. Reclamation feels that no environmental mitigation from the SWRCB should be required for those lands.

The remaining lands for analysis total 7,708 acres. Of these lands, 7,063 acres were in Pleasant Valley Water District prior to inclusion in Westlands Water District. A DWR map reporting crops and land use for those acres in 1958 shows that the vast majority of the land was cultivated even though

the DEIR map shows 4,961 acres of the Pleasant Valley inclusion as native vegetation. The remaining 645 acres were annexed after CEQA. Some of those acres are not considered irrigable.

The lands in Westlands which were listed in the DEIR as native vegetation were so designated because Reclamation had not located any informatio on the status and history of the lands. Therefore, we agreed to use the most protected status for the lands. Subsequent research however has shown that the majority of the lands are in fact cultivated or have been cultivated even though they do not receive CVP water. A letter sent to Reclamation from Westlands states that lands are cultivated for weed and pest control. This area is considered a "third priority" for CVP water delivery. The first priority lands are those lands which were in the original Westlands service area. The second priority lands are those lands after the Westplains merger. The third priority lands were annexed after 1965. Westlands uses all of its contract supply and no additional CVP water will be made available to Westlands under its contract arrangements. Therefore, even if the SWRCB increases the place of use of the CVP to include these 12,985 acres, there will be no increase in the net irrigated acreage for Westlands as a result. Reclamation feels that the 12,985 acres should be added to the place of use for the CVP. No future environmental analysis should be required by the SWRCB on those lands which are not presently receiving CVP water because Westlands uses all of its supply already and is not proposing to use additional water from the CVP. Reclamation feels that sufficient protections exist through the ongoing federal processes to resolve any endangered species issues without SWRCB involvement.

CONCLUSION

Based on the above comments, Reclamation is requesting that the CVP place of use area be conformed to include the service areas of the districts who have contracts with us. It is

important to note that Reclamation feels considerably less mitigation is required than that specified in the DEIR. Nonetheless, there are some lands outside of the place of use which were annexed to districts after long term contracts were signed. Reclamation feels that with the passage of the CVPIA and the various mitigation programs which will be explained by Frank Michny, any mitigation appropriate for this action, will be encompassed within the various programs undertaken by Interior.

APPENDIX I

BIOGRAPHICAL INFORMATION OF CONNIE RUPP UNITED STATES BUREAU OF RECLAMATION

Current Position

Chief Water Rights Section of the Division of Resources Management, Mid-Pacific Region, United States Bureau of Reclamation. The water rights section is responsible for ensuring that the California permits and licenses associated with Mid-Pacific projects comply with state water law.

ACADEMIC BACKGROUND

Bachelor of Arts, Journalism
University of Minnesota, 1972

Juris Doctorate
University of Utah, 1994

PROFESSIONAL ORGANIZATIONS

Member of the American Bar Association
Licensed to practice law in the State of Utah

WORK EXPERIENCE

1996 to Present: As chief of the water rights section, manages the activities associated with complying with California state water law and protecting Reclamation's water rights. The scope of work includes the water rights associated with the various Central Valley Project facilities. Analyzes factual material related to the past, present and fixture use of water in order to compare the relative rights of the United States with respect to rights of others in connection with the potential development of water use for irrigation, municipal, and other consumptive and nonconsumptive purposes. Responsible for preparation of reports, studies, investigations and planning documents on water right matters.

1987 to 1996: Worked in a variety of positions for the Bureau of Reclamation in the Upper Colorado Region including negotiating new and interpreting existing water contracts, resolving issues associated with water rights in Utah, New Mexico, Texas, Colorado, Arizona and Wyoming; and negotiating new and interpreting existing outgrants involving land resource management.

APPENDIX J

STATE WATER RESOURCES CONTROL BOARD

PUBLIC HEARING

1998 BAY-DELTA WATER RIGHTS HEARING

HELD AT
901 P STREET
SACRAMENTO, CALIFORNIA
TUESDAY, MARCH 9, 1999
9:00 A.M.

Reported By: Mary Gallagher, CSR #10749

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LARRY GAGE 10981
STEPHEN FORD 11053

* * * *

[10940] only export water outside of the Sacramento Valley that was surplus.

Congress confirmed this obligation when it authorized construction of the TC Canal. Reclamation has honored these promises more in their breach. There are a number of TC contractors who are short of contract supply. And the Bureau says that there's nothing they can do about it, the only thing those contractors can do is develop their own water rights through an application process here, develop their own projects, et cetera.

The irony of that is that those contractors have tied their destinies, if you will, to the Central Valley Project. And they have no financial ability to develop their own projects at this point. And as you know, probably better than I and our contractors, all of the cheap and easy water sites are already taken.

To the extent that joint point of diversion might increase in valley exports, then we think that the relief prayed for should be conditioned in such a way that Reclamation is required to meet its area of origin obligations, not only to future water rights applicants but also to its existing Sacramento Valley contractors.

Is there any questions?

C.O. STUBCHAER: Any questions of Mr. Atlas? Okay. Thank you for your statement.

[10941] MR. ATLAS: Thank you.

C.O. STUBCHAER: Are there any other opening statements of parties not presenting evidence in this phase? Seeing none we will now take our morning break for 12 minutes.

(Recess taken from 10:20 a.m. to 10:37 a.m.)

C.O. STUBCHAER: Call the hearing back to order.

Mr. Turner, you want to present your panel or your witnesses?

MR. TURNER: Yes.

C.O. STUBCHAER: Good morning.

CASE IN CHIEF FOR THE DEPARTMENT OF THE INTERIOR

BY JIM TURNER

MR. TURNER: Thank you, Mr. Stubchaer. Good morning Mr. Chairman, Members of the Board. I'm James E. Turner, the acting deputy regional solicitor for the Department of the Interior here in Sacramento. I will be appearing on behalf of the United States Department of Interior in this phase of the proceeding in place of Alf Brandt.

I'd like to begin by confirming the statement you made a little earlier, Mr. Stubchaer, that the Department of the Interior, the California Department of Water Resources and the California Department of Fish and Game would like to appear in this phase of the proceeding, [10942] essentially, as one party.

We are going to be presenting a joint proposal to the Board and so we would like to all appear jointly, which we feel will facilitate the presentation of the appropriate evidence and be able to make it clear to both the Board and all of the other parties that we all are talking of a joint proposal to which we all agree.

In light of that, the procedure that we would like to recommend is that I complete my opening statement, that Mr. Sandino, on behalf of the Department of Water Resources would present his opening statement, then Mr. Campbell on behalf of the Department of Fish and Game would present his opening statement.

And we would then call the three departments' witnesses in the following order: I would begin by calling John Renning from the Bureau of Reclamation. Mr. Sandino will then call Larry Gage on behalf of the Department of Water Resources. I will then be presenting Mike Thabault, David Robinson and Dr. Kjelson, the remaining Department of Interior witnesses followed by Jim White for the Department of Fish and Game and Steven Ford as our final witness on behalf of DWR.

And then once all of those witnesses have completed their direct testimony, we would be proposed to be offering all of those witnesses as one panel. And, [10943] again, we're doing this because we feel that it would certainly ease a lot of the complications that might otherwise arise in cross-examination if each of the departments appeared separately.

I understand that there have been situations in the past, which I assume would occur in this situation as well, where if each of the departments appeared individually on cross-examination it might be necessary for the various witnesses to say, "Well, that's something I can't really respond to," and that someone from the other departments might be the more appropriate witness.

In this case we would have the entire group here and the panel would be able to select the witness or witnesses on the panel who are most familiar with and can most appropriately respond to the questions on cross-examination.

So in light of that I would certainly prefer, if at all possible, if the Board could ask all the parties who are presenting questions on cross-examination, if they would present their questions to the panel and then the panel could certainly select the witnesses who could most appropriately respond.

And I realize there may be certain questions that some of the parties would like to present directly to one or more of the witnesses about that Department's position [10944] or whatever, but I think the answers will be coming out the same

since we're talking about a joint approach to this whole problem that has been discussed in great detail among the three departments.

So if that procedure would be appropriate, I would like to just go ahead and begin by just briefly summarizing the testimony and recommendations that would be presented on behalf of the panel. So would that procedure be acceptable to the Board?

C.O. STUBCHAER: Mr. Turner, I think combining of the witnesses and presenting the witnesses as a panel is appropriate. We will have to be lenient on our time of cross-examination because of the size of the panel and the number of parties being represented. And usually we take all of the cross-examination questions as questions to the panel. However, if the cross-examiner wants a response from a particular agency, I would permit that type of question to be asked.

MR. TURNER: I can understand that, Mr. Stubchaer, and I can understand why that may be appropriate in certain situations.

C.O. STUBCHAER: All right.

MR. TURNER: I thank you very much.

C.O. STUBCHAER: Please, proceed.

MR. TURNER: As I mentioned earlier, I will begin by [10945] calling John Renning from the Bureau of Reclamation as our first witness. And he is intending to present a brief description as to the reasons why the Department of the Interior wants to be able to divert water at both the Tracy and Banks pumping plants.

He'll then describe the alternatives that were discussed in the Draft EIR for the implementation of the water quality control plan and the quantities of SWP and CVP that could be diverted pursuant to each.

He'll then explain why the information that he is presenting would support the joint request that is being presented by the departments, and that is that Reclamation and DWR be allowed to divert the CVP and SWP water, either at Tracy or Banks pumping plants, up to the physical capacity of those plants in accordance with an operation plan to be developed through the CalFed process.

And while CalFed, while that operation plan is being developed, through that process that the DWR and the Bureau be allowed to continue to utilize the joint point of diversion in accordance with what I think would most accurately be described as Alternative 4 in the Draft EIR. And that is that we will be making diversions for deliveries of water to the Bureau's Cross Valley Canal contractors to Musco Olives and the Veteran's Cemetery.

I understand that the Tracy golf course is no [10946] longer an intended beneficiary of those deliveries, so it would be the other three that are mentioned in Alternative 3.

And then in addition, Alternative 4 says besides those deliveries we would be continuing to implement the joint point of diversion as has been approved in Board Order 98-9. Then once that operations plan is developed for the CalFed process, we would then commence diverting in accordance with that plan.

Now, Mr. Renning will be pointing out one other fact that we feel is appropriate for recognition by the Board and that is the substance of the 4600 cfs limitation in the Bureau permits with respect to diversions. We want to explain to the Board, make it clear that we feel that that is not a limitation on the total amounts, total quantity of water the Bureau can divert from the Delta, but is limited to the quantities that can be diverted at Tracy in light of that pumping plant's capacity,

Once Mr. Renning is completed, then Mr. Gage will provide the Board with an overview of the effects of the

proposed uses of the joint points of diversion on the operations of both the CVP and the SWP.

I will then present Mr. Thabault and he will be making the recommendation that the Board allow the two projects to make interchangeable use of Tracy and Banks [10947] pumping plants up to their physical capacities in accordance with the plan developed through the CalFed process, but making it clear that that would be conditioned on the recognition that the diversions would, in fact, comply with all applicable federal and state laws and regulations, including, but not limited to, the state and federal Endangered Species Acts.

He will then describe the CalFed goal in developing the operations plan that would not only be consistent with applicable law, but will include some fish protective measures and facilitate the meeting of other CalFed objectives such as water quality and water supply reliability.

I will then be calling Mr. Robinson who will describe the relative environmental impacts of the various joint point alternatives described in the Draft EIR for implementation of the Water Quality Control Plan.

He will be followed by Dr. Kjelson who will identify various matters that he feels should be considered by CalFed when it is preparing the proposed operations plan to ensure that the joint points of diversion are used in a manner that is most beneficial to fish.

Mr. White, from—will then expand on Mr. Renning and Mr. Thabault's descriptions of the [10948] Departments' recommendation. And in like Dr. Kjelson, will identify some matters that he feels should be considered in the CalFed process when it's preparing the operations plan.

Finally, Mr. Ford will describe the fishery benefits that will arise from the Board's approval of the Departments' joint recommendation. So unless you would have any specific

questions, I will be prepared to start calling the witnesses to present the direct testimony.

C.O. STUBCHAER: All right. I thought you were going to allow opening statements.

MR. TURNER: I'm sorry, I forgot about the opening statements. Mr. Sandino would like to make an opening statement. Sorry.

C.O. STUBCHAER: That's all right. Join the club, Mr. Turner.

Mr. Sandino. Good morning.

OPENING STATEMENT BY THE DEPARTMENT OF WATER RESOURCES

BY DAVID SANDINO

MR. SANDINO: Good morning. Maybe our opening statement is not that important anyway. Good morning Chairman Stubchaer, Members of the Board and staff, my name is David Sandino appearing on behalf of the Department of Water Resources.

* * * *

[11769] this afternoon. And, perhaps, maybe Mr. Stubchaer will be back in this afternoon.

And I'd like to have him in on that conversation if we could. If not, if Mr. Stubchaer is not able to make it, then remind me at the conclusion of the testimony today to address this subject, if you would, please.

MR. ROBBINS: Be happy to. Thank you.

C.O. BROWN: Thanks, Mr. Robbins. Good point. Is there anything else before we get started? Mr. Birmingham, you're up.

DIRECT EXAMINATION OF THE WESTLANDS WATER DISTRICT AND SAN LUIS AND DELTA-MENDOTA WATER AUTHORITY

BY THOMAS BIRMINGHAM

MR. BIRMINGHAM: Good morning, Members of the Board. Westlands Water District and the San Luis and Delta-Mendota Water Authority are appearing in Phase VI to urge the Water Board to approve the petition filed by the Bureau of Reclamation to authorize its use of the Harvey Banks pumping plant as an authorized point of diversion of the Central Valley Project.

In support of their position, Westlands and the Authority will call three witnesses: Thomas Boardman, Steven Ottemoeller and David Orth.

Mr. Boardman is a witness from whom the Board in

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APPENDIX K

STATE WATER RESOURCES CONTROL BOARD

PUBLIC HEARING

1998 BAY-DELTA WATER RIGHTS HEARING

HELD AT:
BONDERSON BUILDING
901 P STREET
SACRAMENTO, CALIFORNIA
THURSDAY, MARCH 25, 1999
9:00 A.M.

Reported by: Esther F. Wiatre, CSR NO. 1564

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* * * *

[12327] confidence in our government.

And the state, I might add, is not totally without fault here. They sit on the sidelines silent while this goes on. They join in coordinated operations. They are making their facilities available to pump this water, which is being delivered in violation of the permits. We don't see them as culpable as the Bureau, but we don't see them as free from responsibility. And we would ask through this statement to you that they reconsider their position and see if we can't get this whole thing on a positive light. We wouldn't have to sue you as often, either.

Thank you very much.

C.O. STUBCHAER: Thank you, Mr. Nomellini.

That concludes the opening statements of parties not presenting cases in chief. We will now move on to the case in chief of the Department of Interior.

Mr. Turner, morning.

DIRECT EXAMINATION BY DEPARTMENT OF THE INTERIOR

BY MR. TURNER

MR. TURNER: Good Morning, Mr. Stubchaer, Members of the Board. My name is James Turner. I am the Acting Deputy Regional Solicitor for the Pacific Southwest Region, appearing on behalf of the Department of the Interior.

I wanted to make a short opening statement on behalf of [12328] the Department for Phase VII, but before I do that there is one procedural issue I would like to bring to the Board's and staff's attention. Mark Atlas, the attorney for Tehama-Colusa Canal Authority, had mentioned to me earlier

that he was interested in obtaining a copy of this report, the Senate document that was referred to in the testimony of one of our witnesses, Ms. Rupp. I understand that that particular report had previously been filed in some earlier proceeding, but I did not know whether this proceeding or not.

I was wondering if we could take a minute to see what we could do about getting this particular document available. It is cited, but was not filed as an exhibit. We gave a judicial citation to it. We were expecting to take official or judicial notice of it, but are willing to make it available for review by any of the parties who would like to see it, if they so desire. It is a rather extensive, rather large document that was compiled many, many years ago, so we didn't file it. I was wondering if there is anything we needed to do to clear that up and avoid any kind of problems this may raise for other parties?

C.O. STUBCHAER: Does staff have sufficient identification of the document in question?

MR. CORNELIUS: I don't think I have the total with me for all listings in all phases.

[12329] MR. TURNER: If you have the written testimony of Connie Rupp, on Page 3 the citation is given in the footnote. The title is in the text. It is Senate Document 113, 81st Congress, First Session, dated August 1949.

C.O. STUBCHAER: Do we need time to research this and bring it back later so that the—

MS. LEIDIGH: It is going to take a little time to figure out whether or not we already have this in the record. So perhaps, we could revisit the question a little bit later.

C.O. STUBCHAER: Mr. Atlas, we will get back to that a little later, so we don't necessarily delay the proceedings at this time.

MR. TURNER: Thank you very much, Mr. Stubchaer.

By way of an opening statement, I will be calling two witnesses today on behalf of the Department of the Interior. And as mentioned in our opening statement, they will be addressing the two issues as to the request by the Bureau to consolidate and expand the places of use specified, currently specified, in 16 of the Central Valley Project water rights permits and also to conform the places of use specified in those permits.

My first witness, Connie Rupp, will be begin by explaining why we want to have those water rights permits amended to allow Reclamation to make the water appropriated [12330] pursuant to those permits available for any and all of the multiple uses of the Central Valley Project, in other words, to include all of the appropriate purposes of use in each of those permits.

She will then explain how we determined that the subject water right permits should be revised by expanding the place of use to allow the Bureau to deliver CVP water to all the lands within the authorized service areas of each of the current CVP water service contractors. In making that presentation, she will start by explaining how we have determined what the current boundaries of the currently permitted place of use are. That is normally, as you are undoubtedly aware, a rather simple, mundane project in connection with most water right permits, identifying what is the current place of use. But we determined that that was a much more difficult process in connection with the permits that were issued for the Central Valley Project; and she will explain the analysis that was done that resulted in our conclusion that the currently permitted place of use in the water rights permits already includes a very large number of the acres of land that were identified as encroachment lands or enhancement lands in the DEIR, thereby significantly reducing the number of acres of land that we are currently requesting be added to the CVP place of use.

[12331] As soon as she completes her testimony on these two subjects, I will be calling my other witness, Frank Michny. And Mr. Michny will describe the various activities and programs that the Bureau of Reclamation and the Fish and Wildlife Service are currently pursuing to identify and develop mitigation as necessary for historic and potential future adverse impacts of the Central Valley Project.

We hope that that information will convince you that you, the Board, need not engage in a supplemental or independent analysis of the environmental impacts over and above what the Bureau and Fish and Wildlife Service are already pursuing, and that they will be developing the necessary mitigation for any adverse impacts that are, in fact, so identified.

In closing, I would just like to point out one other thing, and that is I would like to make sure the Board keep in mind, and other parties as well, that what we are currently asking the Board to do is to change the purposes and places of use in the Central Valley Project water right permits. From some of the past opening statements and from, I'm afraid from some earlier impressions that I was getting, a lot of the parties may be assuming that if the Board expands the purposes of use or the places of use under a Bureau permit that will automatically, in and of itself, result in a reallocation of the project water to that new [12332] purpose use, to the new purpose of use or new place of use.

And I just would like to make clear that that is not the substance of this particular petition. That we are looking at having the permits read so that the Bureau can make the appropriate operational decision, recognizing that those operation decisions would need to take into account numerous other factors, including relevant issues of law as many of those other people were mentioning. So I just wanted to emphasize that the witnesses today will not be talking about how the Bureau would intend to reoperate the Central Valley Project if you do, in fact, grant the modifications we are

requesting. Those are subjects that are separate and apart from the phase of these proceedings that we are currently involved in.

Unless the Board Members would have any questions, I would propose to call the Department's first witness, Connie Rupp.

C.O. STUBCHAER: Just a moment.

Before we hear from the witnesses, I just want to restate what he stated in other phases, that the purpose of the oral direct testimony are to summarize the written testimony. The time allocated to do this is 20 minutes per witness, and the oral testimony should not go beyond the scope of the written testimony.

With that, please proceed.

[12333] Mr. Atlas.

MR. ATLAS: Is this panel—are we going to reserve cross-examination until both witnesses have testified or is Mr. Turner—

C.O. STUBCHAER: Our practice has been to cross-examine panels. And when a panel is being cross-examined, the questions are usually directed at the panel, not just a specific person, any member of the panel who has information that can answer.

Mr. Turner.

MR. TURNER: Thank you, Mr. Stubchaer.

Ms. Rupp, would you please state your full name for the record.

MS. RUPP: Connie L. Rupp.

MR. TURNER: Are you currently employed by the Bureau of Reclamation?

MS. RUPP: Yes, I am.

MR. TURNER: Are you familiar with Department of Interior Exhibit 13?

MS. RUPP: Yes.

MR. TURNER: Were you—did you prepare or were you involved in the preparation of that particular written testimony?

MS. RUPP: Yes, I was.

MR. TURNER: Are you familiar with Department of the

* * * *

[12357] MS. RUPP: I am not involved in the operational decisions of the way the project is operated with how much water is released and authorized for export.

MR. HERRICK: But the question was whether or not anybody is examining for permit compliances or law compliances, or compliance with laws, whether or not exports have been limited to only surplus water.

MS. RUPP: I don't know of any study that Reclamation has done, although there may be some. I am personally not aware of these.

MR. HERRICK: Are you aware of any examination by the water rights section of whether or not exports affect on water levels may in some manner violate or not comply with state or federal law?

MS. RUPP: I am not aware of any violations of state or federal law.

MR. HERRICK: Your testimony makes a distinction between the gross acreage that granting of this request would include and the actual acreage that you think is more specifically defining the issue; is that correct?

MS. RUPP: That's correct.

MR. HERRICK: What is that smaller acreage? Forty-nine?

MS. RUPP: 47,880 acres.

MR. HERRICK: Does the Bureau then believe that delivery—does the Bureau then believe that delivery of

* * * *

[12365] she is not capable of identifying the specific statutes, criteria, guidelines that are relied on by the operations people in making operational decisions, that she can probably—she would be able to tell you, yes, she is familiar with that section. How it is being applied by the Bureau and what is being done and how it affects operations, I think, are outside the scope of her area of knowledge.

MR. HERRICK: I don't believe–

C.O. STUBCHAER: Mr. Atlas.

MR. ATLAS: I think it is important right at the outset that we understand what the breadth of this witness' experience is. We have a resume for this woman that says she was Chief of the Water Rights Section, and that the section was responsible for insuring that the California permits and licenses associated with the Mid-Pacific projects complied with state water law.

She goes on to say that her work experience from 1996 to the time that she left included analyzing factual material related to the past, present and future use of water in order to compare the relative rights of the United States with respect to rights of others in connection with the potential development of water used for irrigation, municipal and other consumptive and nonconsumptive purposes.

I think these questions are perfectly appropriate. Based on this woman's representation of her duties and

* * * *

[12375] applicable state and federal law existing under the time of enactment of this title have been met.

Would you agree with that?

MS. RUPP: Okay.

MR. HERRICK: Now, is it your testimony that before the Bureau's making releases in order to comply with federal law that adds duties for fish and wildlife downstream, that before it does that it is supposed to comply with fishery, water quality and other flow requirements contained in the existing permits?

MS. RUPP: I am not aware of the operational considerations. If we look at, in order of appearance, number one, we make releases for this purpose and, number two, I know that we have cooperative operating agreements and other operational considerations. But I don't know the extent of detail on how operational decisions are made.

MR. HERRICK: Well, as part of your job to be responsible for assuring California permits and licenses associated with the Mid-Pacific projects comply with state and water law, did you investigate to see whether or not, before making releases that might not be in compliance with current permit conditions, any particular project is first meeting existing fishery, water quality and other flow and operational requirements?

MS. RUPP: I personally don't make the operational [12376] decisions, and we work closely with our Central Valley operations office. If any questions arise regarding our permits or challenges to potential violations, then we investigate on a specific case.

MR. HERRICK: Can you tell us have you not received any, shall we say, complaints or notifications from the South Delta Water Agency that the operations of New Melones

Project is not dedicating sufficient amounts of water for water quality?

MS. RUPP: I believe that there were complaints on New Melones operations and that they were going to be addressed in the Bay-Delta hearing.

MR. HERRICK: As part of your job to check compliance, you have not checked to see if any of the various federal reservoirs are actually making releases to comply with their existing permit terms?

MS. RUPP: I guess I am not sure—if you are asking me on a day-to-day basis if the head of water rights section goes through and calls up the operations office and checks through the various permit conditions, I am not aware that that is done. I didn't do that when I was the head of the water rights section. That wasn't my responsibility.

MR. HERRICK: Ms. Rupp, I believe you are here today to ask the Board to, I don't want to use a pejorative word, but to bless or authorize henceforth existing releases that the

* * * *

[12425] Is that what your testimony is?

MS. RUPP: Yes.

MR. NOMELLINI: And in 1985 did the Bureau request a conformance or consolidation of the purposes of use of its various permits?

MS. RUPP: Yes.

MR. NOMELLINI: Is it the Bureau's contention that in any way the mere filing of the application in 1985 constituted authority for the Bureau to operate according to the requested changes rather than the permit terms?

MS. RUPP: No.

MR. NOMELLINI: Is there any evidence that you can cite, going back to 1985, that would support the contention that the Bureau believed that it did not need a consolidation of the place of use of its permits in order to conform with its operation?

MS. RUPP: I think that our petition is to allow the flexibility and ask the state to recognize the integrated operations that have always occurred on the Central Valley Project. We can probably break down our project operations facility by facility, but that is not, in fact, how we operate.

MR. NOMELLINI: Do you know if anybody in the Bureau has attempted to ascertain whether or not the actual operations conform to the permit terms and conditions as

* * * *

APPENDIX L

STATE WATER RESOURCES CONTROL BOARD

PUBLIC HEARING

1998 BAY-DELTA WATER RIGHTS HEARING

HELD AT
901 P STREET
SACRAMENTO, CALIFORNIA
TUESDAY, MARCH 30, 1999
9:00 A.M.

Reported By: Mary Gallagher, CSR #10749

* * * *

[12543] Did I accurately read that, Ms. Rupp?

MS. RUPP: I believe so.

MR. BIRMINGHAM: Now, you've testified that you are not an expert in terms of Bureau operations?

MS. RUPP: That's correct.

MR. BIRMINGHAM: And so your statement on Page 2, which I've just read, that it's not practical to try to match up a particular beneficial use to a specific permit, that is a statement being made of you in a layperson's capacity?

MS. RUPP: That's right. It just reflects the integrated nature that we do, in fact, operate under.

MR. BIRMINGHAM: Now, your testimony on Page 2 also makes reference to the enactment of the Central Valley Project Improvement Act?

MS. RUPP: Yes.

MR. BIRMINGHAM: The Central Valley Improvement Act represented a major change in the purpose of the Central Valley Project; is that correct, Ms. Rupp?

MS. RUPP: I believe so.

MR. BIRMINGHAM: Under the Central Valley Project Improvement Act environmental uses of water were put on an even par with other authorized uses of CVP water? MS. RUPP: That's correct.

MR. BIRMINGHAM: And here when we're talking about

* * * *

APPENDIX M

[Seal] United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Southwest Region
2800 Cottage Way
Room E-1712
Sacramento, California 95825-1890

June 8, 1999

Division of Water Rights
State Water Resources Control Board 901 P Street
Sacramento, CA 95812-2000

Attn: Ms. Victoria A. Whitney

Re: Phase 7 of Bay-Delta Water Rights Hearings

Enclosed are the original and nineteen copies of the Phase 7 Closing Brief for the United States Department of the Interior.

If you have any questions or desire any further information, you may call the undersigned at (916) 978-5685.

Sincerely,

David Nawi
Regional Solicitor

By: James E. Turner
JAMES E. TURNER
Assistant Regional Solicitor

Enclosures

cc: See attached list

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

PHASE 7 CLOSING BRIEF FOR THE UNITED STATES DEPARTMENT OF THE INTERIOR HEARINGS

IN THE MATTER OF:
THE BAY-DELTA WATER RIGHT

Alf W. Brandt
James E. Turner
United States Department of the Interior
Office of the Regional Solicitor
2800 Cottage Way, Room E-1712
Sacramento, California 95825
(916) 978-5685
(916) 978-5694 fax

INTRODUCTION

The purpose of Phase 7 of the Bay-Delta water right hearings was to afford interested parties an opportunity to present relevant evidence to the Board to assist it in deciding whether it should approve an amended petition by the Bureau of Reclamation (hereinafter referred to as "Reclamation") to change and consolidate the places and purposes of use specified in certain existing water right permits for the Central Valley Project (hereinafter referred to as "the CVP") and, if so, pursuant to what terms and conditions . The 16 relevant CVP water right permits (hereinafter referred to as "the subject CVP water right permits") are specified in Table 3-2 of the Draft Program. Environmental Impact Report for the Consolidated and Conformed Place of Use (hereinafter referred to as "the DEIR").

The United States Department of the Interior (hereinafter referred to as "the Department") presented two Reclamation employees who presented testimony and exhibits in support of the Reclamation petition, as amended. The first of those witnesses, Connie Rupp described the elements of the amended Reclamation petition including the anticipated impacts of the requested changes. The evidence she presented, DOI Exhibits 13 through 13p specifically addressed (1) the reasons for and the anticipated impacts of the requested consolidation of the purposes of use specified in the subject CVP water right permits; (2) the reasons for and the anticipated impacts of the requested consolidation of the places of use specified in those water right permits; (3) the boundaries of the places of use currently specified in the subject CVP water right permits (hereinafter referred to as "the existing place(s) of use"); and (4) the number of acres and the locations of the lands that Reclamation wants to have added to the existing place(s) of use (hereinafter referred to as the "proposed place(s) of use"). The second Department witness, Frank Michny, explained why various ongoing Department programs will adequately address and appropriately mitigate any adverse environmental effects arising from Reclamation's requested changes to the subject CVP water right permits (DOI Exhibit 14).

* * * *

the area of origin provisions of California water law, Water Code sections 10505, 105053 and 11460-11463, to deliver additional CVP water to those two districts. DOI Exhibit 110 provides, in pertinent part:

> "The statutes and permit terms protecting the areas of origin do not guarantee that the water supply needs of the entire area of origin, or of any particular water user within the area of origin, will be met. Rather, the area-of-origin protections protect water users with(in) the area of origin against previous appropriations for export.

> They are a guarantee that, up to the amount of exports, the Board will not reject a new application in the area of origin on the basis that no water is available for appropriation."

We submit that DOI Exhibit 110 constitutes a correct interpretation of the area of origin provisions of California water law which should be adopted by the Board thereby requiring the rejection of the TCCA' s proposition.

Conforming the purposes of use in the subject CVP water right permits will not deprive any CVP contractors of their respective contractual entitlements to CVP water.

We will conclude by responding to Westlands Water District's objection to Reclamation's request that the purposes of use be conformed in all of the subject water CVP right permits. Like the TCCA's objection to the expansion of the existing place(s) of use CVP water , Westlands' objection is based on the assumption that if fish and wildlife preservation and enhancement is included in the subject CVP water right permits as an additional purpose of use, Reclamation will be *obligated* to deliver CVP water for such a purpose even if such deliveries result in its inability to honor its existing contractual commitments. That assumption erroneous for the following reasons. Neither Westlands Water District nor any other CVP water service contractor is entitled to a fixed supply of CVP water during every year. Each of those water service contracts contains a water shortage provision. Westlands currently has an entitlement, pursuant to its 1963 water service contract with the United States, Contract No.14-06-200-495A, to up to CVP water available for other purposes. A case in point are the provisions of the Central Valley Project Improvement Act (CVPIA) which mandate deliveries

of CVP water for fish protection and enhancement. Section 3402 of the CVPIA provides, in pertinent part:

> "The purposes of this title shall be:
>
> (a) to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California . . ."

Likewise, the introductory paragraph to section 3406(b) of the CVPIA directs the Department to operate the CVP

> "to meet all obligations under state and federal law, including but not limited to the federal Endangered Species Act, 16 U.S.C. section 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project"

Furthermore, section 3406(b)(2) directs the Department to

> "Dedicate and manage annually 800,000 acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; . ."

Finally, one of the activities which the Congress expressly directed the Department to pursue to protect, restore and enhance fish, wildlife and associated habitats through its operation of the CVP is set forth in section 3406(d) of the CVPIA. That provisions directs the Department to deliver certain quantities of CVP and non-CVP water to specific wildlife refuges and wildlife management areas In light of those statutory mandates, there will undoubtedly be years in which Reclamation will not be able to deliver full supplies of CVP water to Westlands and some or all of its other CVP water service contractors. But, it would be inappropriate and inconsistent with such Congressional directives for the Board to deny Reclamation's request to have its water right permits revised, to the extent necessary, to enable it to comply with those directives.

APPENDIX N

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

[Filed Feb. 24, 2006]

Case No. C044714
(Sacramento County Superior Court,
Judicial Council Coordination
Proceeding No. JC 4118)

COORDINATED SPECIAL PROCEEDING
SPECIAL TITLE
(Rule 1550(b))
STATE WATER RESOURCES
CONTROL BOARD CASES

Appeal from the Superior Court of the County of Sacramento,
Judicial Council Coordination Proceeding No. JC 4118
(Superior Court Case Nos. 00CS00603, 311502, 311549,
311499, 309539, 8255859 and 645385)
The Honorable Roland L. Candee, Judge

PETITION FOR REHEARING

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JON D. RUBIN, State Bar No. 196944
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WESTLANDS WATER DISTRICT

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California Rules of Court, Rule 25 2

INTRODUCTION

This Court framed the issue in this appeal as "whether the Board erred in approving the Bureau's request to add fish and wildlife enhancement as an authorized purpose of use in various of the Bureau's permits because the record showed the changes in permits would operate to the injury of a legal user of the water involved." (Opinion at p. 204.) The Court's statement of the issue reflects a two-part inquiry: whether the complaining party is a "legal user of the water involved," and whether the complaining party raises a "cognizable" injury. Appellant and respondent Westlands Water District (Westlands) believes that on the first question, whether it is a legal user of water for purposes of Water Code section 1702, the Court's opinion was absolutely correct. However, Westlands seeks reconsideration of the Court's answer to the injury question on the grounds that the record does not demonstrate the degree to which federal law compels Westlands's injury from reallocation to fish and wildlife uses.

Westlands does not dispute the Court's legal conclusion that under O'Neill v. United States (9th Cir. 1995) 50 F.3d 677, the United States may reduce the amount of water it delivers to Westlands without incurring contract liability, if such reduction is mandated by federal law. But accepting this point does not end the injury inquiry. The next question is, to what extent is the Bureau of Reclamation required to reduce irrigation deliveries in order to meet the requirements of the federal Endangered Species Act, 16 U.S.C. § 1531 et seq., and the Central Valley Project Improvement Act, Pub.L. No. 102-575, 106 Stat. 4706 et seq. ("CVPIA")? The record here does not answer this question. In the proceedings before the State Water Resources Control Board, the Department of the Interior presented no evidence concerning how it must reoperate the Central Valley Project to comply with the federal ESA and the CVPIA. In particular, the Department did not address the range of available options consistent with

the then permitted use of water for complying with the ESA and CVPIA, nor how those options may differ in terms of the injury to legal users of the water involved. Indeed, in other proceedings before the United States District Court, the Department of the Interior asserted that it could comply with the CVPIA through the use of water appropriated under permits that authorized the use of water for fish and wildlife enhancement. (See Westlands Water District, et al. v. Natural Resources Defense Council, et al. (9th Cir. 1994) 43 F.3d 457.) The Board, for its part, granted the petition despite the absence of evidence concerning the degree to which a change in permitted purposes of use was required to comply with federal law.

Accordingly, Westlands petitions for rehearing pursuant to Rule 25 of the California Rules of Court. The Court should reverse the judgment of the trial court, and direct the trial court to issue a writ to the Board to conduct further proceedings related to the injury inquiry. In those proceedings, the Department of the Interior should be required to demonstrate what, if any, injury is compelled by operation of federal law. The Board should then make appropriate findings based on such evidence, and issue a new decision consistent with Water Code section 1702.

Finally, Westlands requests that the Court delete two sentences from page 130 of its opinion relating to area of origin and contracts.

II

ARGUMENT

A. Under O'Neill, The Bureau Is Excused From Contract Liability For Those Shortages Compelled By Law

Westlands concedes that Water Code section 1702 is not a bar to changes to CVP operations that are mandated by federal law. As the Court found, under O'Neill, "'the contract

[between Westlands and the Bureau] does not obligate the government to furnish to Westlands the full contractual amount of water when that water cannot be delivered consistently with the requirements of the Endangered Species Act . . . and the Central Valley Project Improvement Act.'" (Opinion at p. 216 (quoting O'Neill v. United States, supra, 50 F.3d at 680).) Importantly, however, O'Neill does not hold that the federal government has discretion to impose whatever shortages its wishes simply by invoking the ESA or CVPIA; that would render the contract illusory. Instead, the United States is excused from liability only to the extent the shortage is compelled by operation of these laws. As the O'Neill court summarized its holding, the shortage provision in Westlands's contract "absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." (50 F.3d at 689 (emphasis added).)

The federal ESA is a statute of general application. The mandate in the federal ESA most pertinent to the Bureau's operation of the CVP is found in section 7 of the ESA, 16 U.S.C. § 1536. That provision prohibits federal agencies from taking action that will jeopardize the continued existence of a listed species, or destroy or adversely modify its critical habitat. (16 U.S.C. § 1536(a)(2).) Under section 7, federal agencies consult with the federal wildlife agencies concerning the effects of a proposed action on listed species, which results in a "biological opinion." (16 U.S.C. § 1536(b).) If the biological opinion finds jeopardy or adverse modification, the wildlife agency will suggest reasonable and prudent alternatives to the proposed action that would avoid such effects. (16 U.S.C. § 1536(b)(3)(A).) The biological opinion will also authorize "incidental take" of listed species, provided that any specified terms and conditions are met. (16 U.S.C. § 1636(o).) The application of the mandates of the federal ESA has been made specific to the CVP through biological opinions issued

by the United States Fish and Wildlife Service and the National Marine Fisheries Service regarding CVP operations.

The CVPIA applies specifically to the CVP. It includes two mandates relevant here. CVPIA section 3406(b)(2) directs the Secretary to "dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield" for fish and wildlife restoration purposes and measures authorized by the CVPIA, to meet Bay Delta water quality objectives, and to meet other legal obligations imposed on the CVP after its enactment in 1992. CVPIA section 3406(d) directs the Secretary to provide water to certain wildlife refuges at levels specified in plans developed by the Bureau for those areas.

The Secretary of the Interior has considerable flexibility concerning how to operate the CVP to comply with the mandates in CVPIA sections 3406(b)(2) and 3406(d). Indeed, shortly prior to the O'Neill case, the Ninth Circuit Court of Appeals ruled that the few CVP permits that included fish and wildlife uses before the changes approved in Decision 1641 already provided "ample water" for the Secretary to comply with these provisions. (Westlands Water District, et al. v. Natural Resources Defense Council, et al. (9th Cir. 1994) 43 F.3d 457, 461.) In that case, Westlands sought to enjoin implementation of sections 3406(b)(2) and (d)(1) pending the Secretary of the Interior's compliance with the National Environmental Policy Act (NEPA). (Id. at 459.) Westlands argued that the Secretary had time to comply with NEPA prior to implementing these sections, because under section 3411 of the CVPIA the Secretary would have to first take the time to obtain the Board's approval of any changes in the purposes of use.[1] The Ninth Circuit rejected that argument,

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[1] In this case, Westlands has argued that in CVPIA section 3411(a), the Congress made use of CVP water for fish and wildlife purposes subject to California law governing change petitions, including the no injury rule in Water Code section 1702. Under this theory, as a matter of law, the CVPIA would not compel any reallocation of water that would cause

explaining:

> The water districts suggest that section 3411(a) will prevent the Secretary from immediately implementing sections 3406(b)(2) and (d)(1) because only three of the Bureau of Reclamation's water permits provide for fish and wildlife use. This argument is based on a faulty premise. The Bureau's three permits provide ample water to implement sections 3406(b)(2) and (d)(1).[2] Consequently, section 3411(a) will not delay the Secretary's implementation of these sections.

(*Id.* at 461.)

The court in O'Neill addressed the question of whether water supply reduction mandated by federal law was actionable under Westlands's contract; it did not address whether a change in the permitted use of water was mandated by federal law. (O'Neill at 684.) The only Ninth Circuit case that squarely addressed the section 3411(a) issue suggests that any injury resulting from approval of the changes in purpose of use in Decision 1641 is not compelled by operation of the CVPIA, since the Ninth Circuit found that the Secretary could comply with these provisions without such changes.

B. The Bureau Did Not Show What Operations Are Necessary To Comply With Statutory Mandates, Or That Westlands's Injury Would Be Limited To Injury Required To Comply With Federal Law

The Department of the Interior presented two witnesses in Phase 7, Ms. Connie Rupp and Mr. Frank Michny. Mr. Michny's testimony was limited to describing mitigation for

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injury to Westlands. While Westlands respectfully disagrees with the Court's apparent contrary reading of section 3411, Westlands does not seek to reargue this issue on this petition for rehearing.

[2] The three CVP permits the Ninth Circuit referred to are Nos. 16597 (New Melones), 16600 (New Melones) and 11969 (Trinity). (43 F.3d at 461, fn. 1.)

impacts identified in the Place of Use FIR. Ms. Rupp was therefore the sole witness offered by the Department to justify the proposed change in purpose of use. (AR2/3358/17342/12327; AR14/2917/119426/1.)[3] Her written testimony related primarily to place of use. Less than a page related to the change in purpose of use.

At the time of her written testimony, Ms. Rupp was the Chief of the Water Rights Section of the Division of Resources Management for the Mid-Pacific Region of Reclamation. (AR14/2918/119443/1.) She holds a law degree, not an engineering degree. (Id.) In her written testimony, Ms. Rupp stated the Department's rationale for the proposed changes in purpose of use as follows:

> With the magnitude of the CVP and its integrated operations . . . it is not practical to try and match up a particular beneficial water use to a specific permit. In addition, in 1992, Congress passed the Central Valley Project Improvement Act (CVPIA), which amended the
>
> CVP authorizations to include fish and wildlife mitigation, protection and restoration purposes. Consequently, it is important that all of the CVP permits in this petition include the state-defined beneficial use of fish and wildlife preservation and enhancement' to maximize operational flexibility in order to comply with the CVPIA.

(AR 14/2917/119427/2.) Ms. Rupp's written testimony did not further elaborate on her conclusion that it was "important" that all CVP permits include fish and wildlife uses for operational flexibility. She did not testify concerning how the

---

[3] During the phase of the Bay-Delta hearing in which the State Water Board heard testimony and accepted evidence on the change in purpose of use, the Department of the Interior also called Mr. Frank Michny. Mr. Michny, however, did not testify to the petition to change in purposes of use. Mr. Michny's testimony related specifically to the change in place of use, another subject of that phase. (See AR14/2934.)

CVP operates, or what operations are necessary to comply with the mandates of the ESA or CVPIA. She did not testify that, let alone why, the proposed change in purposes of use was necessary in order to comply with the mandates of federal law. Nor would she have been qualified to provide such testimony. As she conceded during cross-examination, she was not involved in CVP operations, and was not an expert in such operations. (AR2/3358/17372/12357, 17380/12365, 17390/12375-17391/12376.) On cross examination, she allowed that her written testimony that it would not be "practical" to account for water used by specific permit was offered only in a "layperson" capacity. (AR2/3359/17558/12543.) And, she testified that "[w]e can probably break down our project operations facility by facility . . ." (AR2/3358/17440/12425).

Although it argued that shortages were compelled by law, the Department of the Interior did not support its argument with evidence showing why or to what extent. No witness for the Department testified regarding what changes to CVP operations are compelled by the ESA and CVPIA. No witness for the Department testified concerning what operational options the Bureau has for complying with the ESA and CVPIA, or how the various options compare in terms of causing injury to CVP contractors. No witness provided testimony demonstrating that injury to CVP contractors from adding fish and wildlife uses to the CVP permits would be limited to that injury mandated by operation of federal law. There simply is no evidence that changes in uses of water permitted under the CVP permits were required to comply with the ESA or CVPIA.

In its closing brief for Phase 7, the Department of the Interior did not even contend that it had demonstrated through substantial evidence what CVP operations are necessary to comply with the mandates of the ESA and CVPIA, and must therefore be continued despite injury to CVP contractors

because they are compelled by law. (AR 15/3234/122454.) It misconstrued Westlands's objection to be that adding fish and wildlife uses to the permits would "obligate" the Bureau to use water for those purposes. (AR 15/3234/122462/9.) The Department apparently failed to appreciate that Westlands's concern was that the change would allow (not obligate) the Bureau to use water for those purposes, at least as a matter of permitted water rights, even if federal law did not mandate it. In its closing brief, the Department cited the shortage provision in the contract, listed sections of the CVPIA it contended "mandate deliveries of CVP water for fish protection and enhancement" and then asserted that "there will undoubtedly be years when" meeting those mandates would result in shortages. (AR15/3234/122464/11.) It argued that "it would be inappropriate and inconsistent with such Congressional directives for the Board to deny [its] request to have its water right permits revised, to the extent necessary, to enable it to comply with those directives." (Id.) The Department did not address the Ninth Circuit's conclusion in Westlands that the existing permits allowed "ample water" to comply with the CVPIA.

C. The Board Made No Findings That Injury Would Be Limited To That Compelled By Federal Law, And It Did Not Condition Its Approval By Requiring That Any Injury Be Compelled By Federal Law

In Decision 1641, the Board interpreted the Department of the Interior's argument to be that reduced irrigation deliveries are compelled by operation of federal law, and hence that the Board's approval of the change petition would not be a cause of Westlands's injury. "In effect, USDI is saying that it is required by federal law to operate in a way that causes shortages of water deliveries to its contractors, and that it will continue to do so whether or not the SWRCB approves the petitioned changes in purpose of use. If USBR is bound by federal law to operate in this manner, the SWRCB's approval

of the changes cannot be the cause of the shortages." (AR1/770/6193/125.) The Board's error, however, was that Interior did not submit any evidence to support its assertion that it was bound by federal law to operate in a manner that reduced contract deliveries to Westlands.

In Decision 1641, the Board made no findings concerning whether and how much water must be reallocated away from irrigation uses in order to comply with the mandates of federal law. The Board briefly considered whether the requirements of federal law could be met by simply abandoning water without reclaiming it, or foregoing diversions and leaving the water instream, but concluded this approach would be unworkable because others could appropriate the water instead. (AR1/770/6194/126.) It then proceeded to explain why in its view Westlands is not a legal user of water, concluding that "[i]n view of the foregoing discussion, the [Board] finds that section 1702 is not an appropriate basis for [Westlands] to raise this issue, which essentially is an dispute between a contractor and its water supplier." (AR 1/770/6197/129.) Having concluded that Westlands is not a legal user of water, the Board apparently found it unnecessary to critically examine whether any substantial evidence supported the Department of the Interior's preemption argument. It made no findings concerning the extent to which shortages are compelled by operation of federal law, and it did not condition its approval of the change in purpose of use to allow only such use as is compelled by federal law.

In sum, in Decision 1641 the Board did not answer the question that this Court's ruling finds is controlling — whether, and to what extent, federal law compels the Bureau's use of CVP water for fish and wildlife uses in a way that results in shortages for CVP contractors. The record does not include information sufficient to answer that question.

D. The Court Should Delete Its Statement Concerning Contracts And Area Of Origin

Westlands respectfully requests that the Court remove two sentences from its opinion. The two sentences are:

> This does not mean a user within the area of origin can compel the Bureau to deliver a greater quantity of water than the user is otherwise entitled under the contract. It simply means the Bureau cannot reduce that user's contractual allotment of water to supply water for uses outside the area of origin, absent some other legal basis for doing so that trumps section 11460.

(Opinion at 130.) These sentences should be removed for two reasons.

First, the sentences are unnecessary to the Court's opinion. For other reasons, the Court rejected the San Joaquin County and Central Delta parties' arguments based on Water Code section 11460.

Second, the conclusion expressed by these sentences is not based on an analysis concerning the relationship between various sections of the Watershed Protection statute. Without analysis, the opinion implies that Water Code section 11462's contract requirement applies to the Bureau's operation of New Melones Reservoir. Under Water Code section 11128, however, only sections 11460 and 11463 of the Watershed Protection statute apply to the Bureau. Water Code section 11128 provides:

> The limitations prescribed in section 11460 and 11463 shall also apply to any agency of the state or federal government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in

furtherance of the single object contemplated by this part."

Neither section 11460 nor section 11463 imposes an obligation on the Bureau to contract with water users in the watershed or area of origin. Section 11462 conditionally imposes such an obligation on theDepartment of Water Resources, but section 11462 does not apply to the Bureau. By removing the two sentences quoted above, the Court may correct this misstatement, without affecting the outcome of the Court's decision.

III.

CONCLUSION

Accordingly, this Court should reverse the judgment in Westlands Water District v. State Water Resources Control Board (Super. Ct. Sac. County 2003, No. 00CS00603), and direct the trial court to issue a writ of mandate commanding the Board to commence further appropriate proceedings to determine whether the change in permitted use of water will result in an injury to legal users of the water involved. In such a proceeding, Interior could offer evidence concerning what changes in operations are compelled to comply with federal law. Absent such evidence, there is no basis for a finding that no injury to Westlands would result from the change in permitted uses of water because the change is required to comply with federal law.

Dated: February 24, 2006

Respectfully submitted,

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IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

[Filed Mar 22, 2006]

Supreme Court Case No. __
Court of Appeal, Third Appellate District, Case No. C044714
(Sacramento County Superior Court, Judicial Council
Coordination Proceeding No. JC 4118)
(Sacramento Superior Court Case Nos. 00CS00603, 311502,
311549, 311499, 309539, 8255859 and 645385)

COORDINATED SPECIAL PROCEEDING
SPECIAL TITLE
(Rule 1550(b))
STATE WATER RESOURCES
CONTROL BOARD CASES

After a Decision of the Court of Appeal, Third Appellate District, Affirming in Part and Reversing in Part a Decision of the Superior Court of the State of California, County of Sacramento, The Honorable Roland L. Candee

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PETITION FOR REVIEW

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I.

ISSUE PRESENTED

Should the federal government be required to prove that federal law actually compels operation of a federal water project in a manner contrary to California water law before it is excused from the requirements of California law?

II.

WHY THE COURT SHOULD GRANT REVIEW

In the landmark case of California v. United States (1978) 438 U.S. 645, the United States Supreme Court held that states may impose conditions upon the control, appropriation, use or distribution of water by federal water projects, provided that such conditions may not conflict with congressional directives. In this case, the Court of Appeal excused the federal government from the "no injury" rule of California Water Code section 1702, based on the application of federal law. It did so even though, in the administrative proceedings below, the federal government provided no evidence regarding how or the extent to which the mandates of federal law actually compel operations of the federal Central Valley Project (CVP) that conflict with California's no injury rule. The Court should accept review to clarify what showing the State Water Resources Control Board and the lower courts must require before they may conclude that the requirements of California water law are preempted by federal law.

In Revised Water Right Decision 1641, the Board granted the federal Bureau of Reclamation's request to amend the water rights permits applicable to the CVP. Those permit amendments added fish and wildlife enhancement as an authorized purpose of use to CVP permits for reservoirs that did not already include fish and wildlife as a use. The permit changes thereby allowed, under state law, reallocation of

water away from existing uses such as irrigation, to the potential injury of CVP contractors. California Water Code section 1702 prohibits permit changes that "operate to the injury of a legal user of the water involved." In Decision 1641, the Board approved the requested changes despite the potential injury and the rule of section 1702. The Board approved the changes despite section 1702 by construing the term "legal user" to not include CVP contractors.

The Court of Appeal correctly rejected the Board's interpretation of legal user in section 1702. However, the Court of Appeal went on to find that "[b]ecause Westlands has no right to CVP water that Congress directed the Bureau to put to other uses in the Central Valley Project Improvement Act, changes in the Bureau's permits that will allow the Bureau to comply with the Central Valley Project Improvement Act [CVPIA][1] will not interfere with Westlands's rights, and therefore the changes will not operate to the injury of Westlands as a legal user of CVP water within the meaning of Water Code section 1702. Consequently, the Board did not err in approving the Bureau's petition to change the purposes of use in its permits, and we will affirm the judgment in Westlands Water District v. State Water Resources Control Board (Super. Ct. Sac. County, 2003 No. 00CS00603) denying Westlands's mandamus petition." (Opinion at 216-217; State Water Resources Control Board Cases (2006) 136 Cal.App.4th 674, 39 Cal.Rptr.3d 189, 294.)[2]

The Court of Appeal's decision dramatically lowers the bar for finding federal preemption of state water law. Nothing in the Central Valley Project Improvement Act, or any other federal statute, facially exempts the federal government from

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[1] Pub.L. No. 102-575, Title 34, 106 Stat. 4706, et seq. (October 30, 1992).

[2] A copy of the Court of Appeal's decision showing the date of filing is attached to this petition, and is referred to herein as the "Opinion."

compliance with the no injury rule in section 1702. There was no evidence before the Board that federal statutory mandates, as applied, require the Bureau of Reclamation to operate the CVP in ways that conflict with California's no injury rule.

In the hearings before the Board on this issue, rather than statutory mandates, the Bureau based its request for amendments on a desire for operational flexibility and convenience in meeting its various obligations. The United States Department of the Interior, on behalf of the Bureau, presented no evidence regarding operations. It did not show whether or how the Bureau must reoperate the CVP to comply with the CVPIA, the federal Endangered Species Act (ESA),[3] or any other federal law. The Department did not identify the range of available options for operating the CVP to comply with the ESA and CVPIA, nor address how those options may differ in terms of the injury to legal users of the water involved. The Department did not demonstrate what the Court of Appeal assumed, that the CVPIA requires the permit amendments. Notably, in other proceedings before the federal courts, the Department of the Interior asserted that it could comply with the CVPIA without the permit amendments later approved in Decision 1641. (See Westlands Water District, et al. v. Natural Resources Defense Council, et al. (9th Cir. 1994) 43 F.3d 457.)

The regulation and use of California's water resources is of critical importance to all Californians. In California v. United States, the United States Supreme Court affirmed that federal water projects are subject to state water law, absent conflict with federal law. That conflict should not be lightly found. Here, the state water law at issue does not expressly conflict with federal law, and there was no evidence that this conflict arises in application. Accordingly, the Court should accept review, reverse the Court of Appeal, and direct that the matter

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[3] 16 U.S.C. section 1531, et seq.

be remanded to the Board for the appropriate inquiry and showing.

III.

SUMMARY OF PROCEEDINGS BELOW

This case involves seven coordinated cases collectively known as the "SWRCB Cases," Judicial Council Coordinated Proceeding No. 4118. The seven cases arose out of an omnibus water rights proceeding before the Board. That proceeding resulted in Revised Water Right Decision 1641, issued in March 2000.

One of the many issues the Board decided in Decision 1641 was whether to add fish and wildlife restoration as an approved purpose of use in the CVP permits. Prior to Decision 1641, most of the CVP permits did not include fish and wildlife restoration as an approved purpose of use. The Bureau sought to add this purpose of use to additional CVP permits. Westlands objected to the proposed change, to the extent that it would allow redirection of water supply from irrigation to fish and wildlife uses. Westlands claimed it and other CVP water users would be injured by the change. Westlands based its objection on California Water Code section 1702, which provides that the Board cannot approve a change to the purposes of use in a water rights permit if doing so would "operate to the injury of a legal user of the water involved."[4]

In Decision 1641, the Board approved the change in purposes of use. It found that section 1702 was not a bar to doing so, because it concluded that Westlands was not a legal user

[4] California Water Code section 1702 provides in full:

> Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved.

of the water involved within the meaning of section 1702. Westlands filed a petition for writ of mandate. (Westlands Water District v. State Water Resources Control Board (Super. Ct. Sac. County, 2003 No. 00CS00603).) The San Luis & Delta-Mendota Water Authority participated in the coordinated proceedings as a real party in interest. The trial court upheld the Board's decision. Westlands appealed.

The Court of Appeal rejected the Board's and the trial court's conclusion that Westlands is not a legal user of the water involved within the meaning of Water Code section 1702. (Opinion at 201217, 39 Cal.Rptr.3d at 287-294.) The Court of Appeal found that "legal user of the water involved" under section 1702 includes those who have a right to use water pursuant to a contract. The Court of Appeal found that because Westlands has a legal right to use CVP water under its contract with the Bureau of Reclamation, under Water Code section 1702 it is protected from any injury that would be caused by the Board's approval of a change in the CVP's permits.

Despite finding that Westlands is a legal user of the water involved, the Court of Appeal affirmed the trial court's judgment. It did so because it found that Westlands does not have a right to use water that Congress has directed (in the ESA or CVPIA) be reallocated to other uses. (Opinion at 216-217, 39 Cal.Rptr.3d at 293294.) For this conclusion, the Court of Appeal relied upon the ruling of the Ninth Circuit in 0 Weill v. United States (9th Cir. 1995) 50 F.3d 677. In the O'Neill case, the Ninth Circuit held that a "shortage" provision in Westlands' contract relieves the federal government of liability for reallocations of water mandated by the ESA or CVPIA. (50 F.3d at 682-687.)[5]

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[5] The Ninth Circuit's decision in O'Neill addressed only the shortage provisions of Westlands's contract. Thus, reliance on O'Neill does not address injury to other CVP contractors with different provisions.

Westlands filed a petition for rehearing, as did other parties. On March 2, 2006, the Court of Appeal denied all petitions for rehearing, without modifying the Opinion.

IV.

ARGUMENT

A. The Bureau Is Excused From Contract Liability Under O'Neill Only For Those Shortages Compelled By Operation Of Federal Law

The Court of Appeal found that Westlands is a legal user of CVP water within the meaning of Water Code section 1702, because it has a right to CVP water under its contract with the Bureau of Reclamation. (Opinion at 213-214, 39 Cal.Rptr.3d at 292-293.) It went on to find, however, that under Ninth Circuit precedent such contract "does not obligate the government to furnish to Westlands the full contractual amount of water when that water cannot be delivered consistently with the requirements of the Endangered Species Act and the Central Valley Project Improvement Act.'" (Opinion at p. 216, 39 Cal.Rptr.3d at 294 (quoting O'Neill v. United States, supra, 50 F.3d at 680).) Under O'Neill, Westlands does not have a contract right to water that Congress has mandated be directed to other beneficial uses.

Importantly, however, O'Neill does not hold that the federal government has discretion to impose whatever shortages it wishes simply by alluding to the general purposes of the ESA or CVPIA; that would render the contract illusory. Instead, the United States is excused from liability only to the extent the shortage is compelled by operation of these federal laws. As the O'Neill court summarized its holding, the shortage provision in Westlands's contract "absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." (50 F.3d at 689 (emphasis added).) The Bureau is excused from its contract obligation, and hence

the no injury rule in section 1702, only if it can show that federal law requires that it operate in a way that causes delivery shortages (i.e., injury).

In addition to its CVP contract, Westlands argued alternative bases for status as a "legal user" of water, including the beneficial use and appurtenancy provisions of 43 U.S.C. § 372. The Court of Appeal expressly declined to reach these arguments. (Opinion at 214, fn. 53, Cal.Rptr.3d at 292 fn. 53.) In context, it is apparent that it so declined based on its conclusion regarding the reach of the CVPIA and ESA. The essential question, then, is whether the CVPIA and ESA mandate that the Bureau operate the CVP in a way requiring the permit changes approved in Decision 1641, with resulting injury to the water supply of CVP contractors.

B. Neither The CVPIA Nor the ESA Compels Water Shortages By Its Express Terms

1. The Express Terms Of The CVPIA Do Not Require Water Shortages, Rather The CVPIA Is Expressly Subject To State Law Governing Permit Changes

The CVPIA was enacted in 1992. The multiple purposes of the CVPIA include: restoring fish and wildlife, addressing the environmental impacts of the CVP, improving CVP operational flexibility, increasing beneficial use of CVP water supplies, assisting the State of California in protecting the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, and achieving a reasonable balance among competing demands for CVP water. (CVPIA § 3402.)

CVPIA subsection 3406(a) adds fish and wildlife restoration to the authorized purposes of the CVP. CVPIA section 3406 includes two mandates concerning allocation of water that are relevant here. CVPIA subsection 3406(b)(2) directs the Secretary to "dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield" for fish

and wildlife restoration purposes and measures authorized by the CVPIA, to meet Bay Delta water quality objectives, and to meet other legal obligations imposed on the CVP after its enactment in 1992. CVPIA section 3406(d)(1) directs the Secretary to provide water to certain wildlife refuges at levels specified in plans developed by the Bureau for those areas.

As is typical of statutes giving direction to administrative agencies, the CVPIA does not dictate how the Secretary of the Interior should implement subsections 3406(b)(2) and 3406(d)(1). Instead, the method of implementation is left to her discretion. Subsections 3406(b)(2) and 3406(d)(1) direct that a portion of CVP yield be allocated to specified purposes. The quantity of water supply developed by the CVP is not unlimited, and hence meeting these mandates might require taking water from other uses. But under state law if reallocating water covered under a permit to a new purpose of use would require a permit amendment, and if that reallocation would cause injury to a legal user of the water involved, section 1702 would bar the Board from approving that permit amendment.

In CVPIA subsection 3411(a), Congress addressed the potential conflict between implementation of the CVPIA and the provisions of state law governing permit changes. Congress made implementation subject to state law. CVPIA subsection 3411(a) provides:

> Notwithstanding any other provision of this title, the Secretary shall, prior to the reallocation of water from any purpose of use or place of use specified within applicable Central Valley Project water rights permits and licenses to a purpose of use or place of use not specified within said permits or licenses, obtain a modification in those permits and licenses, in a manner consistent with the provisions of applicable State law, to allow such change in purpose of use or place of use.

The "no injury" rule of section 1702 is one of the "provisions of applicable State law." Thus, instead of ruling that the mandates of federal law require reallocation despite resulting injury to CVP contractors, the Court of Appeal should have found that any permit amendments necessary to carry out the reallocation of water pursuant to CVPIA subsections 3406(b)(2) and 3406(d)(1) may be allowed only to the extent consistent with the "no injury" rule.

The Court of Appeal's decision upholding the permit amendments on the basis that reallocation is compelled by the mandates of the CVPIA is further contradicted by the Ninth Circuit Court of Appeal's application of the CVPIA, The Ninth Circuit has ruled that the few CVP permits that allowed fish and wildlife uses before the changes approved in Decision 1641 already provided "ample water" for the Secretary to comply with these provisions. (Westlands Water District, et al. v. Natural Resources Defense Council, et al. (9th Cir. 1994) 43 F.3d 457, 461.) In that case, Westlands sought to enjoin implementation of CVPIA sections 3406(b)(2) and (d)(1) pending the Secretary of the Interior's compliance with the National Environmental Policy Act (NEPA). (Id. at 459.) Westlands argued that the Secretary had time to comply with NEPA prior to implementing these sections, because under section 3411 of the CVPIA the Secretary would have to first take the time to obtain the Board's approval of any changes in the purposes of use. The Ninth Circuit rejected that argument, explaining:

> The water districts suggest that section 3411(a) will prevent the Secretary from immediately implementing sections 3406(b)(2) and (d)(1) because only three of the Bureau of Reclamation's water permits provide for fish and wildlife use. This argument is based on a faulty premise. The Bureau's three permits provide ample water to implement sections 3406(b)(2) and (d)(1). Con

> sequently, section 3411(a) will not delay the Secretary's implementation of these sections.

(Id. at 461.)[4]

Thus, the only Ninth Circuit case to squarely address the issue found that the CVPIA may be implemented without the amendments to purpose of use approved in Decision 1641. This holding directly contradicts the Court of Appeal's premise that the CVPIA requires that water covered by the amended CVP permits be used for fish and wildlife purposes despite any resulting injury to CVP contractors.

2. The Express Terms Of The ESA Do Not Require Water Shortages

Unlike the CVPIA, the federal ESA is a statute of general application. By necessity, a determination of whether a shortage to CVP contractors is compelled by operation of the ESA will depend upon proof of its application.

The mandate in the federal ESA most pertinent to the Bureau's operation of the CVP is found in section 7 of the ESA, 16 U.S.C. § 1536. That provision prohibits federal agencies from taking action that will jeopardize the continued existence of a listed species, or destroy or adversely modify its critical habitat. (16 U.S.C. § 1536(a)(2).) Under section 7, a federal agency must consult with the federal wildlife agencies concerning the effects of a proposed action on listed species, which results in a "biological opinion." (16 U.S.C. § 1536(b).) If the biological opinion finds jeopardy or adverse modification, the wildlife agency will suggest reasonable and prudent alternatives to the proposed action that would avoid such effects. (16 U.S.C. § 1536(b)(3)(A).) The biological opinion will also authorize "incidental take" of listed species,

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[4] The three CVP permits the Ninth Circuit referred to apply to the Trinity and New Melones reservoirs. They are Nos. 16597 (New Melones), 16600 (New Melones) and 11969 (Trinity). (43 F.3d at 461, fn. 1.)

provided that any specified terms and conditions are met. (16 U.S.C. § 1636(o).)

Application of the mandates of the federal ESA has been made specific to the CVP through biological opinions issued by the United States Fish and Wildlife Service and the National Marine Fisheries Service regarding CVP operations. A conclusion that all injury to CVP water contractors resulting from reallocation of water to fish and wildlife uses is compelled by operation of the ESA would depend upon a showing that these biological opinions caused all such reallocation.

As we explain next, the federal government made no showing before the Board concerning how the mandates of the CVPIA and ESA are applied to its operation of the CVP, nor the extent to which it has options in operations that may avoid or reduce injury to CVP contractors.

C. In The Hearings Before The Board, The Federal Government Did Not Show What Operations Are Necessary To Comply With Federal Statutory Mandates, Or That Injury Would Be limited To Injury Required To Comply With Federal Statutory Mandates

Since the CVPIA and ESA do not by their express terms mandate reallocation of water in a manner that injures CVP contractors, the question becomes whether, as applied, these laws mandate such reallocation. In California v. United States, the United State Supreme Court remanded for a determiination "whether the conditions actually imposed" in Water Rights Decision 1422 "are inconsistent with congressional directives as to New Melones Dam." 438 U.S. at 679. On remand, the federal government declined to accept this suggestion that it provide evidence of conflict in application. The Ninth Circuit explained that the federal government

> presented on remand to the district court no evidence of impracticality or harmful consequences from any specific condition set by the California Water Board. The United States takes a hard-line position by asserting that since it built the dam it need not justify its operational plans so long as those plans are consistent with the scope of the project as envisioned by Congress. We reject this broad contention, as the Supreme Court has done in this very litigation. While Congress, if it wished, could have eliminated the role of state law in governing the project, the question before us is whether, as a matter of statutory interpretation, Congress has in fact done so. We find nothing in California's conditions that cannot be in harmony with the letter and spirit of the 1962 statute given the failure of the United States to introduce evidence to show the existence of facts that might dictate a contrary result.

(United States v. State of Cal., State Water Resources (1982) 694 F.2d 1171, 1174.) The Ninth Circuit upheld all conditions imposed by the Board, because none had "been shown to be invalid." (694 F.2d at 1182.)

Despite this lesson, the federal government submitted no evidence before the Board showing that federal law mandates reallocation of water covered by the amended permits, or that such mandated reallocation must cause injury to CVP contractors. In the phase of the Board proceedings that addressed changes in purposes of use, the Department of the Interior presented two witnesses, Ms. Connie Rupp and Mr. Frank Michny. Mr. Michny's testimony was limited to describing mitigation for impacts related to the Board's approval of changes to the authorized places of use. Ms. Rupp was therefore the sole witness offered by the Department to justify the proposed changes to the authorized purposes of use. (AR2/3358/17342/12327; AR14/2917/119426/1.)

Less than a page of Ms. Rupp's written testimony related to the change in purpose of use.[5] At the time of her written testimony, Ms. Rupp was the Chief of the Water Rights Section of the Division of Resources Management for the Mid-Pacific Region of Reclamation. (AR14/2918/119443/1.) She holds a law degree, not an engineering degree. (Id.) In her written testimony, Ms. Rupp stated the Department's rationale for the proposed changes in purpose of use as follows:

> With the magnitude of the CVP and its integrated operations . . . it is not practical to try to match up a particular beneficial water use to a specific permit. In addition, in 1992, Congress passed the Central Valley Project Improvement Act (CVPIA), which amended the CVP authorizations to include fish and wildlife mitigation, protection and restoration purposes. Consequently, it is important that all of the CVP permits in this petition include the state-defined beneficial use of fish and wildlife preservation and enhancement to maximize operational flexibility in order to comply with the CVPIA.

(AR14/2917/119427/2.) Ms. Rupp's written testimony did not further elaborate on her conclusion that it was "important" that all CVP permits include fish and wildlife uses for operational flexibility. She did not testify concerning how the CVP operates, or what operations are necessary to comply with the mandates of the ESA or CVPIA. She did not testify that, let alone why, the proposed permit changes involving purposes of use were actually necessary in order to comply with the mandates of federal law.

Nor would she have been qualified to provide such testimony. As she conceded during cross-examination, she was not involved in CVP operations, and was not an expert

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[5] The Board's typical practice is to have witnesses submit direct testimony in writing prior to the hearing. Most of the examination at the hearing comes on cross or redirect.

in such operations. (AR2/3358/17372/12357, 17380/12365, 17390/12375-17391/12376.) On cross-examination, she conceded that her written testimony that it would not be "practical" to account for water used by specific permit for each facility was offered only in a "layperson" capacity. (AR2/3359/17558/12543.) And, contradicting that written testimony, she testified that "[w]e can probably break down our project operations facility by facility" (AR2/3358/17440/12425).

The Department of the Interior only argued, not proved, that it operated the way it did to comply with federal law. In its closing brief for this phase of the Board hearings, the Department cited the shortage provision in the Westlands contract, listed sections of the CVPIA it contended "mandate deliveries of CVP water for fish protection and enhancement" and then asserted that "there will undoubtedly be years in which" meeting those mandates would result in shortages. (AR15/3234/122464/11.) It argued that "it would be inappropriate and inconsistent with such Congressional directives for the Board to deny [its] request to have its water right permits revised, to the extent necessary, to enable it to comply with those directives." (Id.) It did not support its arguments with evidence showing why or to what extent operations that result in shortages are compelled by law. No witness for the Department testified regarding what changes to CVP operations are compelled by the ESA and CVPIA. No witness for the Department testified concerning what operational options the Bureau has for complying with the ESA and CVPIA, or how the various options compare in terms of causing injury to CVP contractors. No witness provided testimony demonstrating that injury to CVP contractors from adding fish and wildlife uses to the CVP permits would be limited to that injury mandated by operation of federal law. There simply is no evidence that changes in uses of water permitted under the CVP permits were required to comply with the ESA or CVPIA.

D. The Board Made No Findings That Injury Would Be Limited To That Compelled By Federal Law, And It Did Not Condition Its Approval By Requiring That Any Injury Be Compelled By Federal Law

In Decision 1641, the Board interpreted the Department of the Interior's argument to be that reduced irrigation deliveries are compelled by operation of federal law, and hence that the Board's approval of the change petition would not be a cause of Westlands's injury. "In effect, USDI is saying that it is required by federal law to operate in a way that causes shortages of water deliveries to its contractors, and that it will continue to do so whether or not the SWRCB approves the petitioned changes in purpose of use. If USBR is bound by federal law to operate in this manner, the SWRCB's approval of the changes cannot be the cause of the shortages." (AR1/770/6193/125.) What the Board overlooked is that the Department of the Interior did not submit any evidence to support its assertion that it was bound by federal law to operate in a manner that reduced contract deliveries.

In Decision 1641, the Board made no findings concerning whether and how much water must be reallocated away from irrigation uses in order to comply with the mandates of federal law. The Board briefly considered whether the requirements of federal law could be met by simply abandoning water without reclaiming it, or foregoing diversions and leaving the water instream, but concluded this approach would be unworkable because others could appropriate the water instead. (AR1/770/6194/126.) It then proceeded to explain why in its view Westlands is not a legal user of water, concluding that "[i]n view of the foregoing discussion, the [Board] finds that section 1702 is not an appropriate basis for [Westlands] to raise this issue, which essentially is a dispute between a contractor and its water supplier." (AR1/770/6197/129.) Having concluded that Westlands was not a legal user of water, the Board apparently found it unnecessary to critically examine whether any substantial evidence supported

the Department of the Interior's preemption argument. It made no findings concerning the extent to which the permit amendments were necessary to implement the CVPIA, or whether shortages to CVP contractors are compelled by operation of federal law. And, it did not condition its approval of the change in purpose of use to allow only such use as is compelled by federal law.

In sum, in Decision 1641 the Board did not even address the preemption question—whether, and to what extent, federal law necessitates the permit amendments and compels the Bureau's use of CVP water for fish and wildlife uses in a way that results in shortages for CVP contractors.

V.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for review.

Dated: March 21, 2006

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